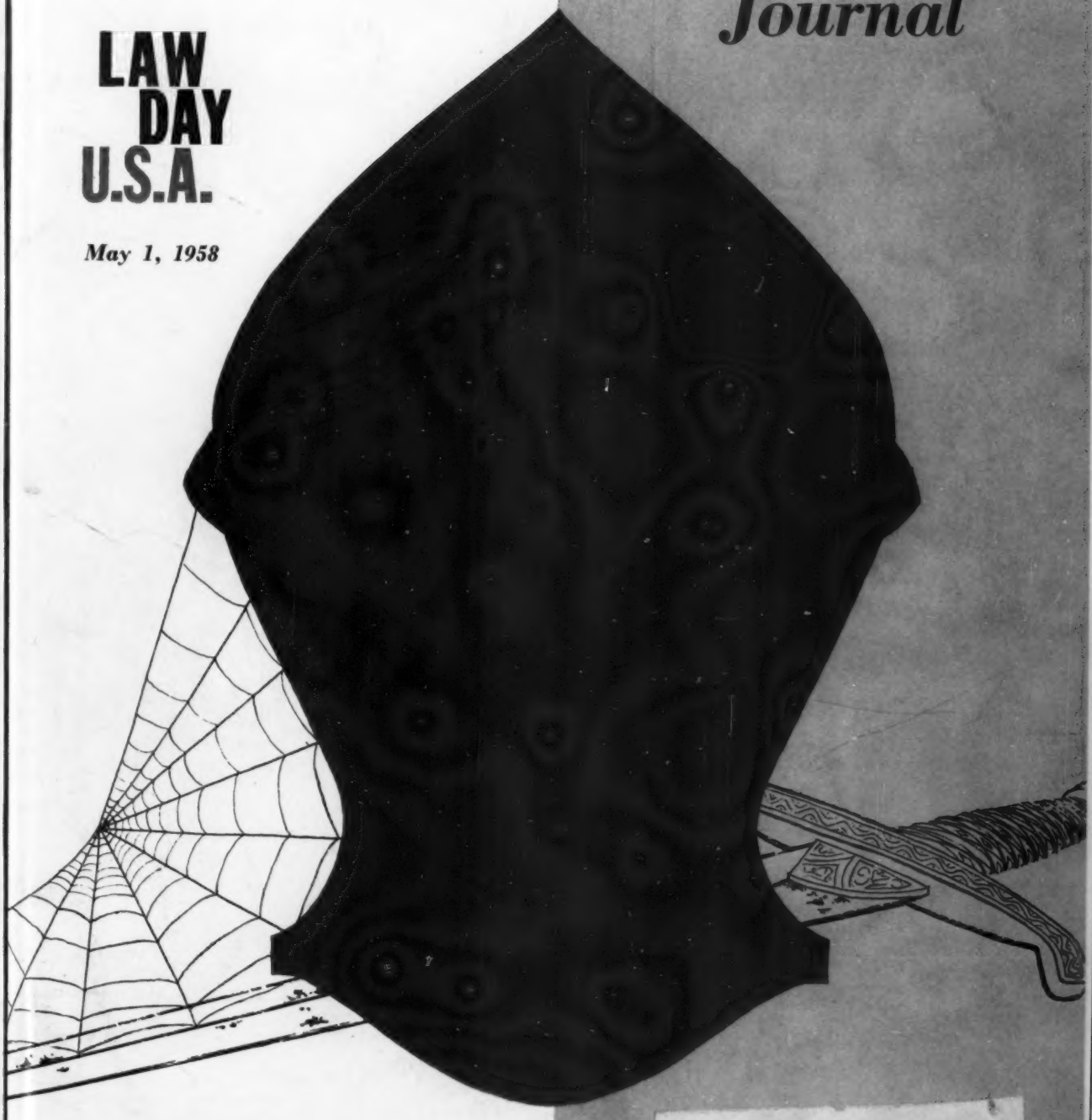
American Bar Association Journal

LAW DAY U.S.A.

May 1, 1958



APRIL 1958 • Volume 44 • Number 4

WILLIAM H CROUCH
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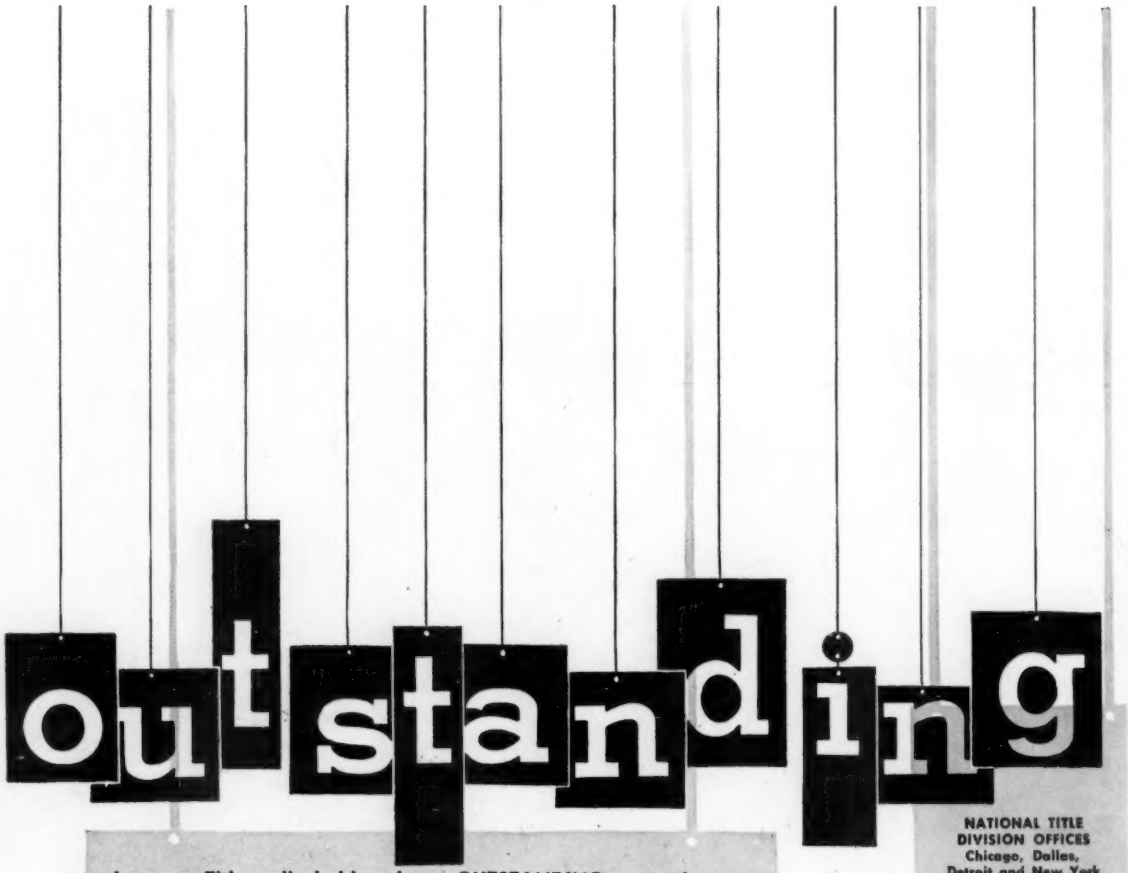
WASHINGTON 17 D C



Lawyers Title policyholders have OUTSTANDING protection. In 1957 Lawyers Title increased its

Capital and Surplus by	**$ 777,780.**	**to**	**$ 9,806,541.**
Reserves by	**$ 881,228.**	**to**	**$ 8,476,446.**
Capital, Surplus and Reserves	**$1,659,008.**	**to**	**$18,282.987.**

Sound, equitable underwriting practices have built for Lawyers Title the kind of reputation that makes possible the continued **outstanding** growth of the company.

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THOUSANDS OF APPROVED ATTORNEYS LOCATED THROUGHOUT THE OPERATING TERRITORY

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April, 1958

THE AMERICAN BAR ASSOCIATION JOURNAL is published monthly by the AMERICAN BAR ASSOCIATION at 1155 East 60th Street, Chicago 37, Illinois. Entered as second class matter August 25, 1920, at the Post Office at Chicago, Illinois, under the act of August 24, 1912. Price per copy, 75c; to Members, 50c; per year, $5.00; to Members, $2.50; to Students in Law Schools, $3.00; to Members of the American Law Student Association, $1.50. Vol. 44, No. 4. Changes of address must reach the JOURNAL office five weeks in advance of the next issue date. Be sure to give both old and new addresses.

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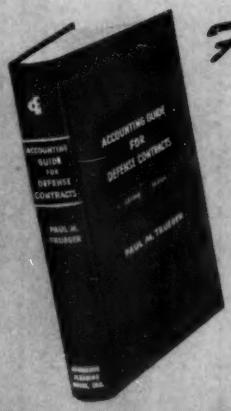
IF YOU HAVE GOVERNMENT CONTRACT PROBLEMS YOU NEED THESE CCH AIDS . . .



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In this new 480-page guide for those concerned with government contracts, the author covers the accounting side of government contracts from every angle. He tells what is required and what the Government expects by way of records; what its stand is on items of allowable and unallowable costs. He illustrates income tax effects of defense accounting problems and gives his own slants on plans and solutions. Public vouchers under cost-fee contracts; price redetermination and termination claims; renegotiation; cutbacks and stretch-outs; research and development contracts; etc.; are fully covered. Pertinent law and regulations are highlighted and filled-in Forms provided for help in preparing termination claims. Only $12.50 a copy on 15 days' approval. Use the handy coupon below to get your "show-how" free examination copy.

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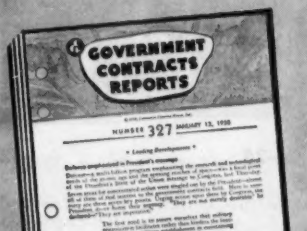

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The President's Page

Charles S. Rhyne

On May 1, the lawyers of America will carry out their largest joint enterprise in all history. On that day, as the international Communist conspiracy extols the rule of the super-state, we in America will be observing our first nationwide tribute to the rule of law—the basic foundation upon which our system of government and the individual freedom of our people are founded. On that day we lawyers, as the major guardians of the law, must assume the primary responsibility of leading our people in a great observance of our nation's indebtedness to the rule of law. We must make everyone aware of what the law has meant and what it can mean to our people as a great stabilizing influence in this era of change where revolutionary scientific developments have brought unprecedented peril from abroad and unprecedented change and progress at home.

President Eisenhower in proclaiming May 1 as "LAW DAY—U.S.A." called upon the legal profession, the press, and the radio, television and motion picture industries to carry out appropriate ceremonies and activities to make this "a day of national dedication to the principle of government under laws". The President referred to our "great heritage of liberty, justice and equality under law", and cited "our moral and civic obligation as free men and as Americans to preserve and strengthen that great heritage" as well as our duty to focus the attention of all peoples upon our system of government as "an inspiration and a beacon light for oppressed peoples of the world seeking freedom, justice and equality for the individual under laws".

This is a preliminary report on the way in which the legal profession of our country has accepted its responsibility for "LAW DAY—U.S.A."

The delegation of each state in the House of Delegates of the American Bar Association has assumed the duty of assisting its state bar association in setting up a state-wide organization to insure that through the state association, and through their state's local bar associations, the plan for this nationwide observance in honor of the role of law in American life is carried out as outlined in the American Bar Association's handbook of information and suggestions for "LAW DAY—U.S.A."

Through the energetic action of the presidents of these state and local bar associations, speakers have been or will be offered for May 1 to every high school, college, law school and civic or other association. These lawyer-speakers will talk on what the law has meant to our country, and what it can mean in the turbulent era in which we live—domestically and internationally, and beyond the planet earth in the utilization of the vast unexplored frontiers of space. Material for speakers has been furnished by the American Bar Association. Any speaker wishing more material may obtain it by writing to "LAW DAY—U.S.A." Observance, 1155 East 60th Street, Chicago 37, Illinois.

It is hoped that the courts will open and close on "LAW DAY—U.S.A." with an appropriate statement on the rule of law, equal justice under the law, and what our great constitutional principles mean in the administration of justice in our country.

By now, we have been assured that the governors of the states and the mayors of cities, have either issued proclamations of "LAW DAY—U.S.A." or that they will do so, thus giving added emphasis and support to this day of rededication to the law. It is believed that before "LAW DAY—U.S.A." arrives, we will have 100 per cent co-operation.

Reflection will bring to mind that while we are a people who have a deep respect for the law, many of our domestic and international troubles flow from a disrespect for the law. Juvenile delinquency, the traffic slaughter on the highways and moral decay leading to problems in various areas of our society stem directly from a flouting of the law and a falling away of respect for it. The cause of war has always been a flouting of the rule of law in the international community. Future wars can arise from the same cause. There is, therefore, a pressing need to recreate and increase respect for adherence to the law. We lawyers should take full advantage of our opportunity on "LAW DAY—U.S.A." to reaffirm confidence in and respect for the law at all levels of government and in all areas of human relationship.

The legal profession of our country, known for its rugged independence of

(Continued on page 321)

Views of Our Readers

■ Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the Journal or otherwise, within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves to itself the right to select the communications or excerpts therefrom which it will publish and to reject others. The Board is not responsible for matters stated or views expressed in any communication.

An Addendum to Disciplinary Figures

The Table on Disciplinary Action in the Legal Profession that accompanied my article "The Client's Security Fund", published in your February issue, said as to Georgia "No Information Obtainable".

That was true when I submitted the manuscript. Since then the Georgia figures have been compiled by Miss Katharine C. Bleckley, Clerk of the Supreme Court of the State of Georgia.

In Georgia discipline is enforced on a county basis, and there are 159 counties in the state.

The magnitude of the problem emphasizes our debt of gratitude to Miss Bleckley. Older members of the Association will be happy to know that Miss Bleckley's father was a close friend of Governor Slaton and Judge Powell, proprietors at our conventions of the famous Wahoo Club, known for its hospitality.

Anyone can complete the table by inserting the Georgia figures:

	Disbarred	Suspended
1955-56	1	1
1956-57	0	0
	Reinstated	**Resigned**
1955-56	0	0
1956-57	0	0

REGINALD HEBER SMITH

Boston, Massachusetts

Our Latin Got Us in Dutch

A small matter, but one which perhaps should be called to your attention:

The write-up of Grotius on page 1065 of the December, 1957, issue contains two minuscule errors. The Dutch jurist's name in his native language is de Groot (rather than van Groot), and the title of his treatise is *De Jure Belli ac* (not "*et*") *Pacis.*

Antiquarians please take notice! . . .

RICHARD H. AMERMAN

New York, New York

Another Defender of the Jury System

Mr. McKenzie's timely and well documented "A Defense of the Jury System" (January issue, 44 A.B.A.J. 51) was enjoyed very much.

The truth of the business is that the jury by and large does its job much better than any other group connected with the administration of justice, yet the jury system is under constant attack from one ill-advised quarter or another. Judges not infrequently make the most egregious errors; they sometimes misinterpret the simplest legal propositions and occasionally exceed the bounds of their office. The reports are filled with blunders committed by trial judges. Appellate judges make mistakes too, though, like doctors, many of their wrong decisions are buried. Even so, some appellate rulings are so patently in error that this is manifest from the printed report. But God alone knows how many reported cases there are that appear to be correctly decided only because all the material facts are not stated in the opinion. Many parties and lawyers know from sad experience that pertinent, controlling evidence is sometimes completely ignored by some appellate judges or else misstated so as to support the "decision" already reached. (That many lawyers and some judges apparently don't realize that a judge who "decides" cases without faithful regard for the facts does the same thing indirectly that a dictator does directly, who, by fiat, closes the courts, is a travesty that should receive more attention from the profession.)

We lawyers not infrequently prepare and present cases so poorly that victory is impossible, then blame the jury when disappointments inevitably come. But I believe that a jury rarely makes a mistake in the setting that it works in. If all the pertinent evidence is properly presented and apt judicial instructions are given—instructions that clarify rather than confuse—a jury of ordinary citizens can be relied upon to reach a fair verdict in practically every case, no matter how complex. As Mr. McKenzie points out, insurance companies, in establishing their reserves, repeatedly estimate very nearly what the jury will do. But the very ablest lawyers are often at a complete loss to know what some judges will do in situations that are free from any real legal difficulty.

If lawyers and judges would more earnestly attend to their own duties and leave entirely to the jury the role of weighing the credibility of evidence in contested cases, justice would be better administered.

EUGENE H. PHILLIPS

Winston-Salem, North Carolina

Mr. Justice Miller on Executive Enforcement

In your February, 1958, issue (page 113) you invite comments on Mr. Schweppe's article concerning the enforcement of federal court decrees by the use of troops.

To one who owes no allegiance to any national administration as such, it appears that Mr. Schweppe has "covered the waterfront", and that if he omitted anything it was the following quotation from the opinion of Mr. Justice Miller in *U. S.* v. *Lee*, 106 U.S. 196, 220:

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance.

(Continued on page 298)


WE'RE ON OUR WAY TO 100,000*
Reaching 100,000 members will be very important milestone for your Association.
It will mean more strength, greater stature, more resources—human and financial.
MOST IMPORTANT, it will mean that your national organization will be better equipped to serve YOU more effectively.
*Membership in the American Bar Association has tripled since 1935
1935 - 26,000
1945 - 34,000
1955 - 55,000
1957 - 70,000
Turn page to learn how you can help reach this goal

all you need to do is . . .

(1) Send the membership application form printed at the bottom of this page to a non-member lawyer friend, offering to be the endorser of his application.

(2) Return the completed application form to the American Bar Association, 1155 East 60th St., Chicago 37, Illinois.

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Enclose with application, check covering first year's dues. Applicants elected subsequent to April 1, 1958, will immediately receive all privileges of membership although the initial payment of their membership dues will be credited to the fiscal year ending June 30, 1959.

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MRS.
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(Please print)

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(Street) (City) (Zone) (State)

RESIDENCE ADDRESS _____
(Street) (City) (Zone) (State)

ORIGINAL ADMISSION TO BAR (STATE) _____ (YEAR) _____

FIRM NAME (IF ANY) _____

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See Pages 391 and 392 for details of the Group Life Insurance Plans.

published monthly

American Bar Association Journal

the official organ of the American Bar Association

The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the Bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect so far as possible, the objectives of the organized Bar of the United States.

There are eighteen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Antitrust Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Family Law; Insurance, Negligence and Compensation Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral and Natural Resources Law; Municipal Law; Patent, Trademark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of 36, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who is a member in good standing of the Bar of any state or territory of the United States, or of any of the territorial groups, or of any federal, state or territorial court of record, is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement and nomination by a member of the Association in good standing. All nominations made pursuant to these provisions are reported to the Board of Governors for election. The Board of Governors may make such investigation concerning the qualifications of an applicant as it shall deem necessary. Four negative votes in the Board of Governors prevent an applicant's election.

Dues are $16.00 a year, except that for the first two years after an applicant's admission to the Bar, the dues are $4.00 per year, and for three years thereafter $8.00 per year, each of which includes the subscription price of the JOURNAL. There are no additional dues for membership in the Junior Bar Conference or the Section of Legal Education and Admissions to the Bar. Dues for the other Sections are as follows: Administrative Law, $5.00; Antitrust Law, $5.00; Bar Activities, $2.00; Corporation, Banking and Business Law, $5.00; Criminal Law, $2.00; Family Law, $5.00; Insurance, Negligence and Compensation Law, $5.00; International and Comparative Law, $5.00; Judicial Administration, $3.00; Labor Relations Law, $6.00; Mineral and Natural Resources Law, $5.00; Municipal Law, $3.00; Patent, Trademark and Copyright Law, $5.00; Public Utility Law, $3.00; Real Property, Probate and Trust Law, $5.00; Taxation, $6.00.

Blank forms of proposal for membership may be obtained from the Association offices at 1155 East 60th Street, Chicago 37, Illinois.

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How Good Earnings for the Telephone Company Benefit the Telephone User

Good earnings provide both the incentive and the means for better telephone service and greater value.

But if earnings are low, and all energies and judgments must be directed to meet the pressing needs of the moment, it becomes impossible to do the best for the long run.

For a practical illustration, let's take a telephone engineer who is figuring out what size telephone cable should be installed to serve a growing neighborhood.

He knows it must serve 200 homes right away. He's reasonably sure also that in another couple of years perhaps 200 more homes will want service. Putting in a cable today that is big enough to serve all 400 homes will cost more at the start.

However, putting in a smaller cable today that will serve only 200, and another of equal size two years later, will cost a lot more in the end.

What will the engineer do?

If the company is pinched for money, he'll have to put in the smaller cable, even though this will be more expensive in the long run.

But if the company is in good financial shape—

If it can readily get the capital required for the big cable—

And if the general level of earnings justifies absorbing the temporarily higher cost of the larger cable until the time when its full capacity is utilized—

Then the engineer will decide to go ahead with the larger cable. Over the years this will save money for both the company and telephone users, and produce the best service.

Telephone people are called on to make decisions like this, day in and day out. In all these decisions good earnings are essential to assure the greatest economy and progress.

There is nothing to justify the philosophy that keeping telephone earnings low is the way to insure low rates.

Such a policy, by limiting progress and long-range economies, leads inevitably to poorer service at a higher price than the customer would otherwise have to pay.

BELL TELEPHONE SYSTEM

Pre-Appraisal Speeds Country Club Fire Settlement To 26 Days

When the fire broke out, it was early evening and 300 members were dining in the Plantation style main building of an exclusive country club. After firemen battled for two hours the roof collapsed. The loss finally mounted to $141,758.85. Total coverage, based on a Marshall and Stevens appraisal, for the entire club was for $195,500. Complete settlement for the gutted portion, amounting to $141,758.85 was made in 26 days.*

APPRAISAL QUALIFIES CLAIM

This story points two morals. First, an appraisal made in advance assures a logical insuring base and in case of disaster the required proof of loss for quick settlement. Second, selection of Marshall and Stevens as unbiased appraisal experts assures acceptance of the appraisal.

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Views of Our Readers

(Continued from page 292)

with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.

It is the only supreme power in our system of government, and every man who, by accepting office, participates in its functions, is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.

The writer of that opinion, it will be remembered, was an appointee of President Lincoln.

R. H. KELLEY

Houston, Texas

"The President Was Within His Rights"

In your preface to the scholarly article by Alfred Schweppe in the February issue of the JOURNAL, you suggest that comments would be welcome. These observations are made pursuant to that suggestion.

This article on the "Enforcement of Federal Court Decrees", beginning with following paragraph:

> The legal problem is simply stated, namely: Where does the legal power reside to enforce Federal Court decrees rendered under Article III, the judicial article, of the United States Constitution?

The specific question discussed in the article is the power of the President under the Constitution to do what was done in connection with the segregation controversy at Little Rock. To find the constitutional authority for the act of the President, examination should, of course, be directed primarily to Article II, rather than Article III, of the Constitution. Section 3 of Article II provides that the President shall "take care that the laws shall be faithfully executed".

Regardless of court decisions involving other and entirely different fact situations, it would seem that in ordering the troops to Little Rock, the President was directly performing the mandate of the quoted provision of the Constitution. Any other conclusion would have to be based upon the idea that the Constitution is not a law of the United States, whereas it is the paramount law, "The law of the land". The Fourteenth Amendment is a part of that Constitution. In the segregation cases, the Supreme Court applied the constitutional provisions contained in the Fourteenth Amendment to the state laws in question. Its decisions were that these laws violated that part of the Constitution. In other words, the state legislation violated the fundamental law of the United States. If the President by the Constitution is empowered to "take care that the laws shall be faithfully executed", is it not reasonable to include the fundamental law as within that power? Moreover, the President's oath of office prescribed by the Constitution requires him to the best of his ability to "preserve, protect and defend the Constitution of the United States". Is it not reasonable to think that he should in the performance of his oath resist to the best of his ability, as Commander-in-Chief, is necessary, a flagrant attack upon the Constitution, as interpreted by the Supreme Court?

(Continued on page 300)

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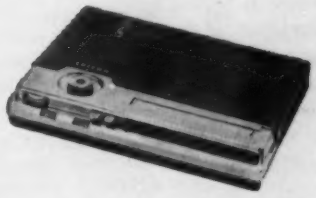

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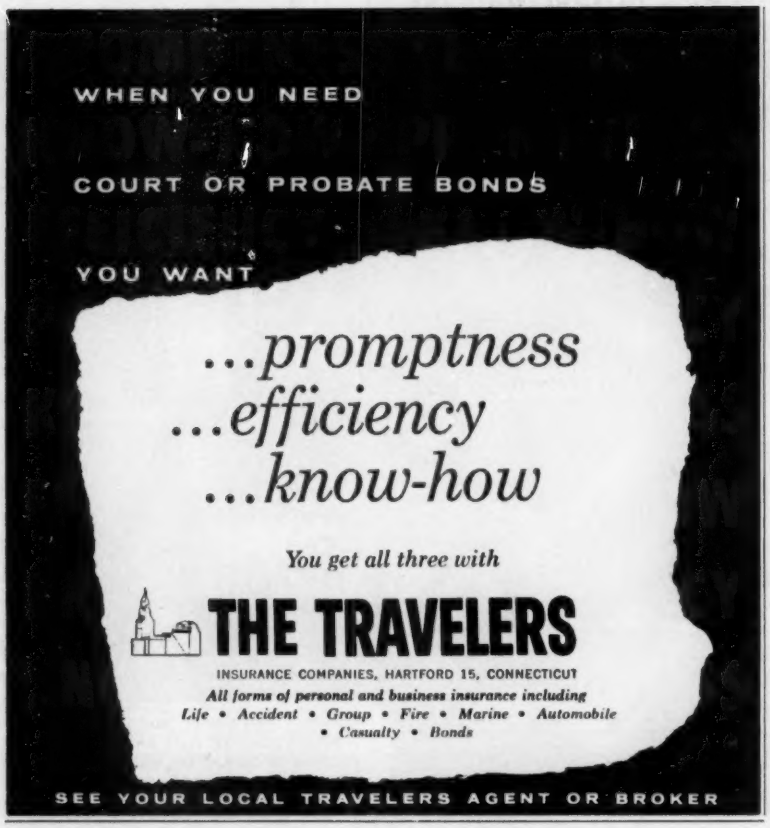

Views of Our Readers

(Continued from page 298)

In the Little Rock case, the President was not so much enforcing a court decree as he was seeing to it that the provisions of the Fourteenth Amendment, as interpreted by the court charged with the duty of interpretation, were "faithfully executed".

J. C. PRYOR

Burlington, Iowa

A Lawyer's Brief Is Not Bad Writing

In his generous and informative treatment of our *Modern Researcher* (January, 1958), your reviewer ventures one interpretation which we are particularly eager to correct because it is derogatory to lawyers as a class. What we said about a sample of prose we were analyzing is that the repeated use of businesslike pointers in a sentence, *e.g.*, "such information", "the aforesaid", etc., makes a passage resemble a lawyer's brief. Your reviewer thinks we meant that this was "bad writing". Had we meant that we would have said so. There is nothing bad about the legal style in its proper place; indeed, it is indispensable, as Sir Ernest Gowers showed in *Plain Words*. But bits of a lawyer's brief ought not to turn up in historical narrative or essays for the general reader, for their effect there is paradoxically to distract attention, and by making the thought less fluent to render understanding more difficult. To each genre its own devices.

JACQUES BARZUN
HENRY F. GRAFF

Columbia University
New York, New York

Public Relations of the Bar

President Charles S. Rhyne is to be congratulated for crystallizing the most urgent desire of general members of the Bar for bar association effort to improve public relations as indicated on his "The President's Page" of the February issue of the JOURNAL.

In furtherance of that thinking may I suggest that in addition to the objectives therein set forth, the activity in this field be directed to show, to tell the story of the fact that the average lawyer is a decent, hard working, moral, charitable minded, good citizen of his community. Trying to be objective and unprejudiced as possible, I still maintain that there isn't any other group that I personally like more socially, intellectually and fraternally—and would rather trust in handling my life savings or my estate.

VICTOR D. TORT

Atlantic City, New Jersey

Contributory Negligence and German Lawyers

Will you please print some more articles defending the rule of contributory negligence as opposed to comparative negligence? They are a source of enlightenment and amazement for German legal professors and scholars.

ROBERT A. RIEGERT

Heidelberg, Germany

Law Books for Friendly Free Nations

You have been generous in helping me with my Law Books for Friendly Free Nations project. We estimate that we have now caused some 18,000 law books to be sent to some thirty-three different nations. These come as a good will offering of American lawyers to men of our profession overseas.

I now have on my desk requests for books that I am unable to fill. These come from some twenty-eight different schools and universities in some fifteen different countries. They ask for books on constitutional, international, civil, comparative, commercial, maritime, air, and prison law. They ask in some instances specifically for Ruling Case Law, American Jurisprudence, Corpus Juris, and Corpus Juris Secundum. They ask in some instances for the ALR, and several request United States Supreme Court Reports.

In addition to the above, there is a request from fifteen universities in England for United States Supreme

(Continued on page 302)

8 New Books in This Field

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Academy for Scientific Interrogation *edited by* **V. A. Leonard,** *State Coll. Washington.* Know how—featuring the technical aspects of polygraph examination; interrogation of the subject before and after testing; question preparation; rights of the subject; clinical team approach; compensatory reactions and irregularities in chart interpretation. *(Police Science Series.)*

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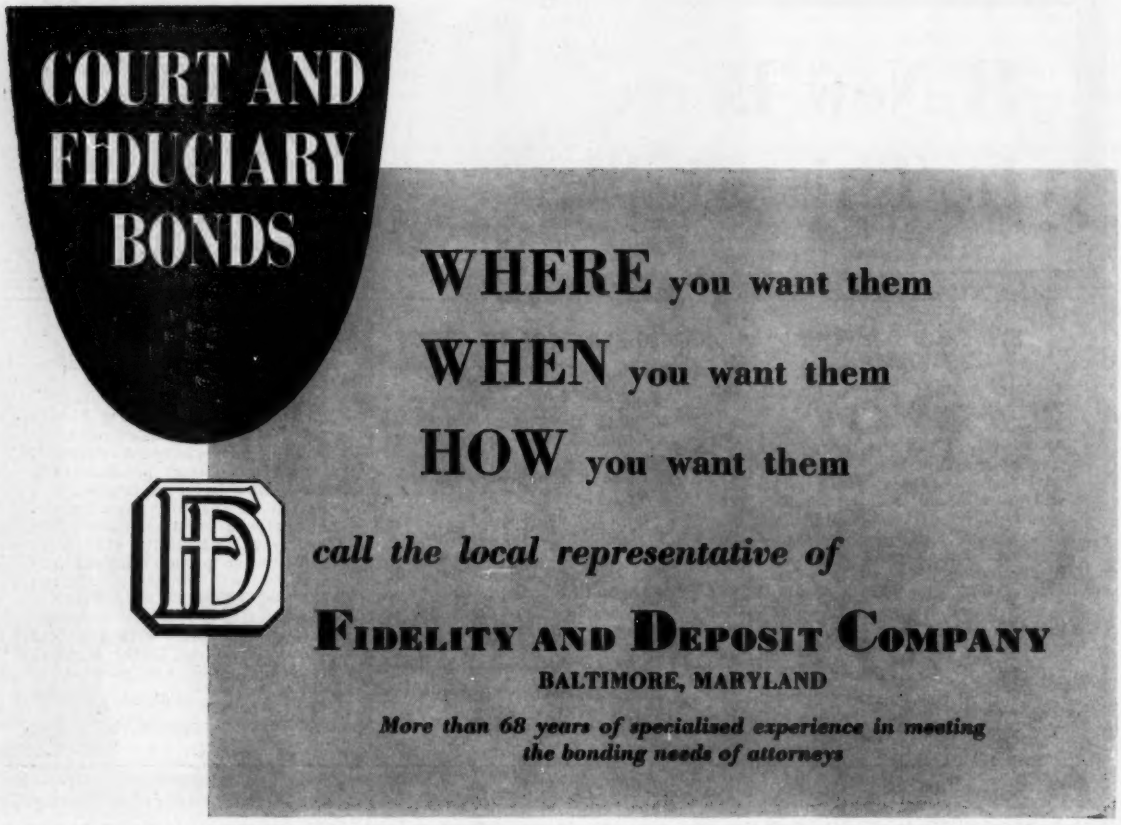

Views of Our Readers

(Continued from page 300)

Court Reports, including the advance sheets.

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ROBERT G. SIMMONS

Nebraska Supreme Court
Lincoln, Nebraska

Economic Status of the Profession

I wish to commend Mr. John C. Satterfield and the American Bar Association for the effort it is putting forth regarding the economic status of the legal profession. President Charles Rhyne and the Committee which he appointed are to be congratulated for doing an outstanding work which has long been needed. Many of the members of the Bar are not keeping up economically with the times. The article written by Mr. Satterfield in the AMERICAN BAR ASSOCIATION JOURNAL for February, 1958, certainly points up the difficulty. The comprehensive fashion in which the Association is tackling the problem will no doubt be fruitful.

We should all with undying thanks put our shoulders to the wheel in the effort being made by the Association in this great movement.

D. BERNARD COUGHLIN

President
Kentucky State Bar Association

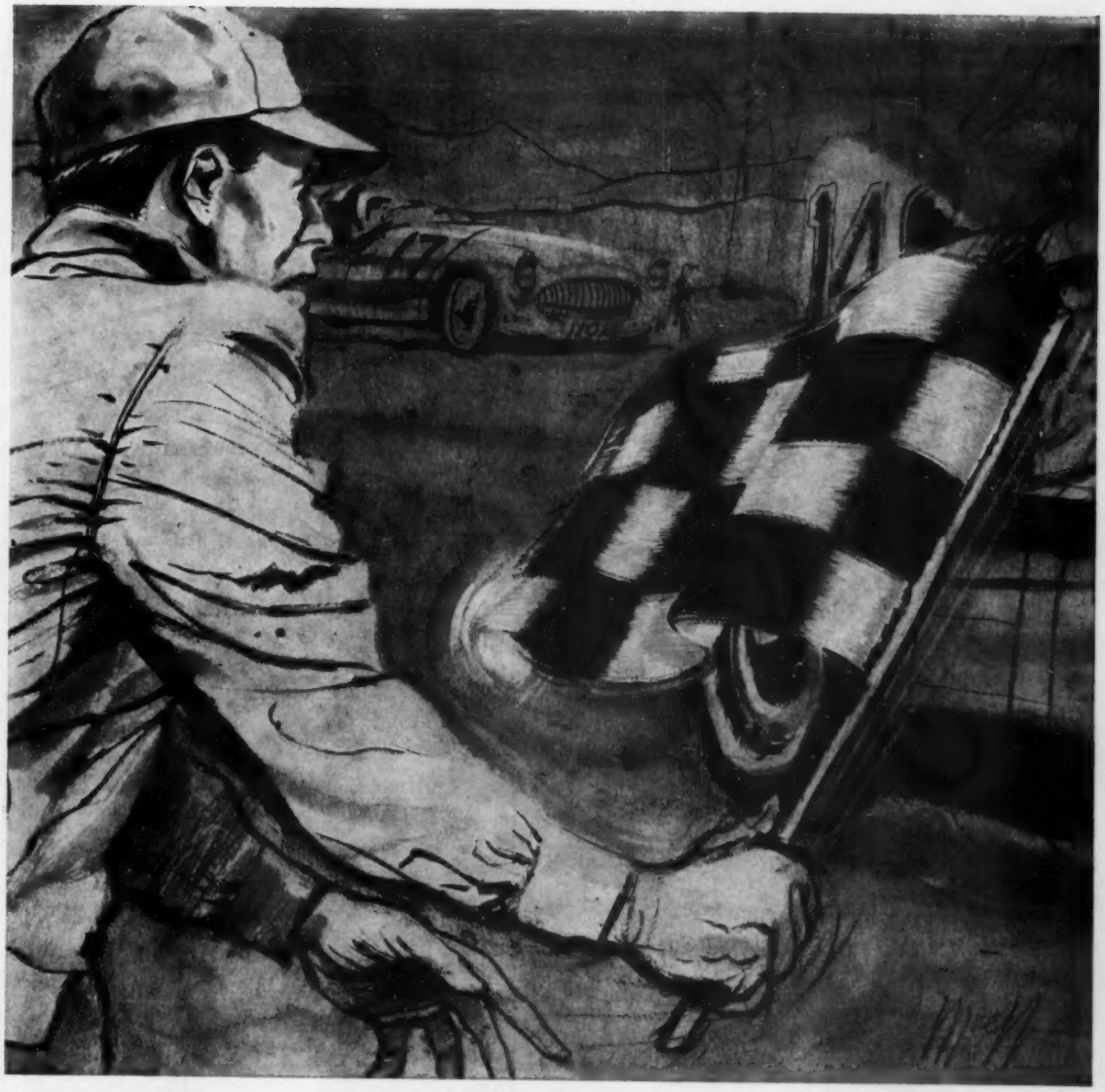
A Bouquet for Judge Christenson

I just want to make a very brief statement of commendation to Hon. A. Sherman Christenson, U. S. District Judge for the District of Utah, for his very able statement entitled "A Judge Looks at His Profession", which appeared in the February, 1958, issue of the AMERICAN BAR ASSOCIATION JOURNAL, being in Vol. 44, No. 2.

I have never in my thirty-four years of practice read or heard a more ably prepared statement regarding the high ideals of our profession than Judge Christenson prepared and to which I refer.

BEN J. BIEDERWOLF

Evansville, Indiana



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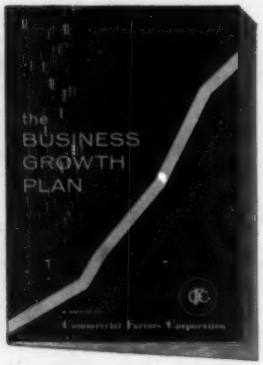

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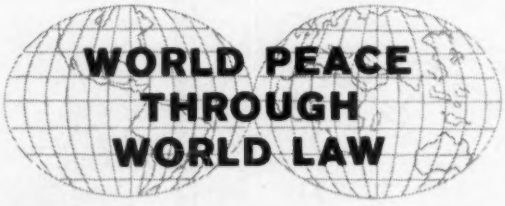
the nations of the world decide that the present "balance of terror" policy can no longer be tolerated what steps can they take to ensure lasting peace?



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Nominating Petitions

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The undersigned hereby nominate E. B. Smith, of Boise, for the office of State Delegate for and from Idaho to be elected in 1958 for a three-year term beginning at the adjournment of the 1958 Annual Meeting:

Robert W. Green, Oscar W. Worthwine and Frank Davison, of Boise;

Kales E. Lowe, of Burley;

Robert L. Alexanderson, of Caldwell;

Sidney E. Smith, William S. Hawkins and E. T. Knudson, of Coeur d'Alene;

Louie Gorrono, of Emmett;

Charles Scoggin, of Fairfield;

William S. Holden, of Idaho Falls;

Thomas A. Madden and Paul W. Hyatt, of Lewiston;

Tom Felton, of Moscow;

Perce Hall, of Mountain Home;

Frank F. Kibler, of Nampa;

A. L. Merrill and O. R. Baum, of Pocatello;

Ralph Litton, of St. Anthony;

Sherman F. Furey, Jr., of Salmon;

Jack M. Murphy, of Shoshone;

Everett B. Taylor, of Sun Valley;

R. P. Parry and Harry Benoit, of Twin Falls;

Charles E. Horning, of Wallace.

Maryland

The undersigned hereby nominate Walter V. Harrison, of Baltimore, for the office of State Delegate for and from Maryland to be elected in 1958 for a three-year term beginning at the adjournment of the 1958 Annual Meeting:

William J. McWilliams, of Annapolis;

Emory H. Niles, Eugene A. Alexander, III, Reuben Caplan, Grafton D. Rogers, Richard H. Lerch, Morton J. Hollander, W. Lester Baldwin, J. Gilbert Prendergast, Theodore R. Dankmeyer and H. W. Buckler, Jr., of Baltimore;

Daniel T. Prettyman, of Berlin;

Preston P. Heck, A. Parks Rasin, Jr., William Dunbar Gould and Elroy G. Boyer, of Chestertown;

Manuel M. Weinberg, Charles U. Price, W. Jerome Offutt, Richard E. Zimmerman, James McSherry and Charles M. C. Mathias, Jr., of Frederick;

E. McMaster Duer, of Pocomoke City;

John W. T. Webb, of Salisburg;

Kenneth C. Proctor, of Towson.

Maryland

The undersigned hereby nominate R. Carleton Sharretts, Jr., of Baltimore, for the office of State Delegate for and from Maryland to be elected in 1958 for a three-year term beginning at the adjournment of the 1958 Annual Meeting:

(Continued on page 310)

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Nominating Petitions

(Continued from page 308)

G. C. A. Anderson, H. Paul Rome, Joseph Bernstein, F. Edward Wheeler, W. Gibbs McKenney, George O. Blome, Jack L. Medwedeff, Morris A. Baker, Paul M. Higinbothom, Thomas H. Hedrick, Edward F. Shea, Jr., Joseph Sherbow, James J. Doyle, Jr., Theodore Sherbow, S. Herbert Harris, Eli Frank, Jr., and Edward A. Smith, of Baltimore;

Calvin Harrington, Jr., of Cambridge;

Carlyle J. Lancaster, T. Hammond Welsh, Jr., and Thomas B. Yewell, of Hyattsville;

James H. Cook, John Grason Turnbull and Johnson Bowie, of Towson;

William B. Bowie, of Upper Marlboro.

New York

The undersigned hereby nominate Lewis C. Ryan, of Syracuse, for the office of State Delegate for and from New York to be elected in 1958 for a three-year term beginning at the adjournment of the 1958 Annual Meeting:

Hunter L. Delatour and Albert Conway, of Brooklyn;

Edward H. Letchworth, Hugh McM. Russ and Franklin R. Brown, of Buffalo;

Charles S. Desmond, of Eden;

Charles W. Froessel, of Jamaica;

Harry A. Gair, Louis M. Loeb, Harold J. Gallagher, Cloyd Laporte, Weston Vernon, Jr., Harrison Tweed, Orison S. Marden, Robert E. Lee, Whitney North Seymour, Mason H. Bigelow, Benjamin A. Matthews, Thomas N. Tarleau and Edwin M. Otterbourg, of New York;

Clarence R. Runals, of Niagara Falls;

Arthur VD. Chamberlain, of Rochester;

Edmund H. Lewis and Francis D. McCurn, of Syracuse;

Kenneth B. Keating, of Washington.

Ohio

The undersigned hereby nominate Philip C. Ebeling, of Dayton, for the office of State Delegate for and from Ohio to be elected in 1958 for a three-year term beginning at the adjournment of the 1958 Annual Meeting:

Frank H. Harvey, R. C. Norris and William A. Kelly, of Akron;

Robert P. Goldman, Clyde M. Abbott, John N. Gatch and Joseph C. Dinsmore, of Cincinnati;

Howard L. Barkdull, Robert H. Jamison, William S. Burton, H. Walter Stewart, Ashley M. Van Duzer, and Thomas A. Quintrell, of Cleveland;

Waymon B. McLeskey, John Eckler, John W. Bricker, Hugh K. Martin and Barton Griffith, of Columbus;

Harry S. Winer, Irving G. Bieser and Eugene A. Mayl, of Dayton;

Carl A. Weinman, of Steubenville;

Fred A. Smith, Fred E. Fuller and Wayne E. Stichter, of Toledo.

Oregon

The undersigned hereby nominate Glenn R. Jack, of Oregon City, for the office of State Delegate for and from Oregon to be elected in 1958 for a three-year term beginning at the adjournment of the 1958 Annual Meeting:

James O. Goodwin and Frank P. Santos, of Oregon City;

John F. Kilkenny, Harold A. Fabre, Edward J. Clark, Raley Peterson, Alfred F. Cunha, Thomas M. Mosgrove, B. D. Isaminger and George H. Corey, of Pendleton;

Roy F. Shields, Howard K. Beebe, Ralph R. Bailey, William H. Morrison, Bruce Spaulding, Gordon Moore, Lamar Tooze, Wendell Gray, H. Lawrence Lister, John F. Reynolds, C. Girard Davidson, Alfred C. Veazie, Herbert C. Hardy and Nicholas Jaureguy, of Portland;

George A. Rhoten, of Salem.

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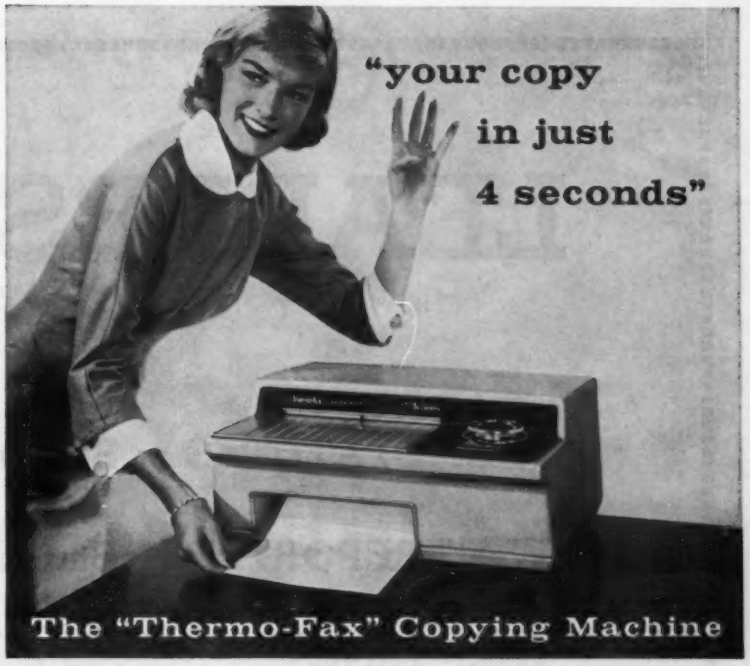

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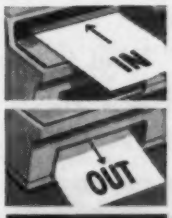

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"Law Day—U.S.A.":

Emphasizing the Supremacy of Law

by **Charles S. Rhyne** • ***President of the American Bar Association***

May 1, which used to be an occasion for the celebration of the arrival of fine weather, celebrated by the crowning of a May queen and dancing around a Maypole, has in recent years been appropriated by the leaders of world Communism to celebrate their own achievements with a show of armed might and vainglorious speeches. This year, May 1 will have a different significance in the United States, for that is the day named by proclamation of President Eisenhower as "Law Day—U.S.A.", a day for rededication by the American people of their faith in the rule of law and a time for recalling the supreme importance of the law in the lives of all free men. Mr. Rhyne set the keynote for this observance when he addressed the opening session of the Atlanta Regional Meeting, February 20. There could be no better summary of the aims and purposes of "Law Day—U.S.A." than these ringing words of the President of the Association.

President Eisenhower has proclaimed May 1, 1958, as "Law Day—U.S.A." This official proclamation is a call for action in recognition of the law and what it has meant to our country and imposes a duty and responsibility upon lawyers to apprise the people of America of the great privilege it is to live under the rule of law. We must do our part on "Law Day—U.S.A." to bring home to our people the tremendously important role of the law in our daily lives as well as the increasingly important role that law must play in relations between nations.

Because of our daily contacts with our nation's legal structure and our ceaseless battle to insure equal justice to all of its inhabitants, we lawyers are perhaps a little more appreciative of our life under the rule of law than the average man. But lawyers and laymen alike should pause and recognize the tremendous contribution which law has made to our way of life, both as a promoter of our progress and as an insurer of the rights which made that progress possible.

The selection of May 1 as "Law Day—U.S.A." has great significance. May 1 is also the day on which international Communism celebrates its past victories and looks forward to its future conquests. There could be no better date for us to recall the basic moral and philosophical principles upon which our society is based, and to contrast them with the cynical, immoral and atheistic philosophy which underlies the international Communist conspiracy.

In the context of current history we are going through an inventorying process as we gird ourselves to fight the Communist menace, which operates by economic, psychological and subversive means as well as by threat of armed force. It seems well that we tie to our strengths and shore up our weaknesses. In any such inventory one must concede that the idea of individual freedom under law is the great ideal we offer to the world. Respect for and adherence to law is ingrained in all Americans. So it has been since the birth of our nation. While the average individual is not learned in the law, there is an intense sense of justice which burns within him. There is an almost instantaneous adverse reaction to any unlawful or illegal action. We believe in, and we live under, the law. We are a "law-ful" people.

It seems well therefore that we pause to pay tribute to the law and what it has meant to us. The space age has brought a need for new concepts as new frontiers and new horizons have been opened to the human race. But there is also a need to reaffirm old traditional concepts whose validity and fundamental importance cannot be shaken by any scientific or technological achievement. The rule of law is such an unshakeable concept.

Among all the contending ideas which have fought for the minds of men since the dawn of history, the concept of individual human freedom has been outstanding. On this concept, which embodies the natural law, which was the heart and core of Magna Carta, which is the spirit and guiding light of our Bill of Rights, we can build with every confidence that it is

a foundation not of sand but of everlasting rock.

Individual freedom and justice, under law, is the great principle that distinguishes our form of government and our way of life from the Communist system. It is the keystone of our moral leadership in the world. This unique national observance of "Law Day—U.S.A." affords a dramatic opportunity for the American people to reaffirm their dedication to the rule of law and to demonstrate to the world that their faith in it is unshakeable.

As our Declaration of Independence affirms, the true purpose of government is the protection of the fundamental rights of man. Any denial of this purpose necessarily results in absolutism. Dean Roscoe Pound has said that the strongest bulwark of any nation against absolutism is the law. But, as totalitarianism has illustrated, this bulwark is real only when the concept of the law includes also the concept of natural rights. It is by the denial of this basic principle that totalitarianism is able within the framework of so-called law to subvert the primary purpose of the law. Basically, the true advantage of the rule of law in a democracy is the affirmation of the dignity and individuality of the human being. It is the affirmation of the purpose of the state to protect and safeguard this dignity. It is the recognition that the state exists for man, and not man for the state. Only within such a philosophy can a government of law and not of men be assured. Without such a philosophy, government by rule of law becomes impossible, and arbitrary rule must necessarily be substituted for it.

From its inception to the present zenith of its power, ours has been a "government of law rather than of men". Colonial and frontier courts applied as law that innate wisdom of the centuries which had come down to them through the crystallized public opinion of what is fair as recorded by Aristotle and Montesquieu and Coke. And while our whole system of law was bottomed firmly upon the great principles and precedents of the English common law, we also created law of our own fitted to the needs of the New World. A good example of this is the famous jury charge of Judge Andrew Jackson, who presided over thousands of trials in the frontier country of western North Carolina and the new State of Tennessee. He instructed juries to "Do what is right between these parties. That is what the law always means."

Law is the intangible force that makes freedom and progress possible. It is law that brings order into the affairs of men—that enables them to lift their sights above mere survival, to accumulate possessions, to develop the arts, to pursue knowledge, and to enjoy life among their fellows. Law gives the individual security that they could obtain in no other way; it protects the family and other groups organized for the advancement of common interests; it permits the growth of great cities and the development of vast enterprises. In other words, it is the cement that holds our free society together.

And what is law?

Definitions by great men down through history have been many:

Samuel Johnson called the law "the last result of human wisdom acting upon human experience for the benefit of the public".

Cicero said: "Law is the highest reason, implanted in nature, which prescribes those things which ought to be done and forbids the contrary."

Grotius said: "Law is a rule of moral action obliging to do that which is right."

Blackstone's definition of law is probably the one most quoted in law schools. He said: "Law is a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong."

Charles Evans Hughes said:

> The fundamental conception which we especially cherish as our heritage is the right to law itself, not as the edict of arbitrary power but as the law of a free people springing from custom, responsive to their sense of justice, modified and enlarged by their full will to meet conscious needs and restrained by authority which is itself subject to law—the law of the land.

We tend to regard too narrowly and too shallowly the law and its functions and purposes. When we regard the law as a servant of our free enterprise system, we see the truth, but only part of the truth. When we see the law as the great resolver of differences, when we see the law as the one viable substitute for brute force in human society, when we see the law as the guardian of our rights and the protector of our freedoms, we see clearly, but always in part only. The law is all these things, and more.

Law is in a sense codified history; but not merely this. It is also medicine, accounting, engineering and science—for all professions in the ultimate depend upon law as the basic foundation for their existence and operation and service. They are licensed, protected and governed by law.

Law is made up of the accumulated wisdom of the people, plus the power to pass decisive judgment in accordance with that wisdom, plus the various procedures, formulas and facilities involved in legal process. But the power to pass decisive judgment is not law in and of itself, any more than legal forms and formulas and all the panoply of process, taken alone, are law. Nor is the accumulated wisdom of the people law without the power to pass decisive judgment and all the machinery necessary for handling particular cases. But when these three —wisdom, power and machinery—are combined, when the power of government is used to apply the accumulated wisdom of the people to individual cases through a system of legal machinery which is available to every individual, then we have a true rule of law.

One of our most priceless blessings as citizens of the United States of America is our rich heritage of ordered freedom under law.

Our nation was created and nourished on due process of law. The liberties found in our Bill of Rights are the essence of America.

Law reigns supreme in our nation at the municipal level, the state level and the national level, and is the one common thread which runs through the wide variety of mechanisms used

by local, state and federal governments to achieve governmental objectives. From the adoption of the Constitution down to the present day, law has been the cement which has held together our complicated local, state and federal governmental structure. Supremacy of the law is the concept which has controlled at all levels of government. In every instance the aim is to put law above the whims of man. We as a people believe in and have lived by William Pitt's famous saying, "Where law ends tyranny begins."

Civil law aims at orderly and peaceful adjustment of all reasonable claims. Criminal law aims at protection of the public, punishment of the offender, and deterrence of commission or repetition of the offense.

Law is concomitant with good government.

We need to make the distinction between a government under *law* and a government under *laws*. This is important. You cannot have a government without laws, for even the spoken whim of an absolute monarch is a law for his subjects. Government under law means much more than just having laws. Government under law connotes stability, permanence almost timelessness. Government under law connotes rightness, righteousness—in the sense of conformity with the natural law—and justice. Law connotes order and certainty.

In a government under law, it is recognized that basic individual rights are only formulated by laws, but do not depend for their existence upon such laws. In a government under law, there is no arbitrary power to punish any man except for a distinct breach of the law established in an ordinary legal manner before the courts. And in a government under law, every man is equal before the bar of justice, without any distinction based on class, whether of race, or creed, or wealth, or color or any other.

Equal protection of the law is a cornerstone of our governmental system: equal justice under law to the poor and to the rich, to the weak and powerful alike.

Law is rooted in justice. Justice is both its foundation and its objective.

We speak of our ideal as a government of law and not of men; but we cannot have a system of functioning law without men. It takes men—wise men and trained men—to preserve the accumulated wisdom of the people, to understand it and to apply it to particular cases. It takes men—dedicated men, selfless men—to exercise properly the power of decisive judgment. It takes men—skilled men, diligent men—to operate smoothly the machinery which we call legal process. All these are among the functions of lawyers. Here is the justification for the legal profession. The greatness of our nation is due to the liberty under law that exists here—a liberty which lawyers have created and fought to maintain all through our history. We lawyers can be proud that our profession has lived up to its duties and responsibilities.

Government under law is impossible without lawyers. Every new invention or scientific discovery, every new business practice, every new activity in which the government itself engages, poses new problems which lawyers must solve. In both form and content, almost all the institutions of government are the work of lawyers. But lawyers are seldom fully appreciated, and the extent of our national need for lawyers is neither felt nor recognized except in times of great stress or emergency, when the services of lawyers become priceless and indispensable.

Time was when development of the law by a slow evolutionary process was sufficient to keep it abreast of normal political, scientific and industrial transformation. But today, if the evolution of the law is too slow to keep pace with racing scientific and military technology of our space age, we shall almost surely face disaster. The hope of civilization is establishment of the rule of law on an international basis to govern relations between nations, not only on the planet earth but in outer space as well, before some unwise application of force sends the four horsemen of war, pestilence, famine and death on what may be their last ride across the face of the earth. The struggle for a world ruled by law must go on with increased intensity. We must prove that the genius of man in the field of science and technology has not so far outstripped his inventiveness in the sphere of human relations as to make catastrophe inevitable. If man can conquer space he can also solve the need for legal machinery to insure universal use of space for peaceful purposes only. With the Kremlin now only thirty seconds via missile from Washington, the absolute necessity of such machinery requires no further emphasis.

Self-government by law is an inherent right of free people.

The Pilgrims who came to Plymouth Rock and our first permanent settlers at Jamestown sought escape from the arbitrary power of an English king who ruled without the law's restraining influence. These ancestors of modern-day Americans carried in their minds a dream of re-establishing the individual liberty under law which King John had promised more than three hundred years previous when he affixed his seal to Magna Carta at Runnymede.

Today, after three hundred and fifty years, the greatest strength of America lies in this concept of individual liberty under law. Other systems of government have produced great scientists, great musicians, and other outstanding achievements. But no system has produced the individual freedom which exists in America. And the reason for this achievement is that our system is founded upon and governed by the rule of law.

The more one reads and studies history the more he becomes impressed with the amazing wisdom of the draftsmen of our Constitution. One explanation for their wisdom may be that they were more experienced than we in the abuses of governmental power. They lived in times of monarchy, feudalism, military dictatorship, colonialism. revolution and, yes, even anarchy. They were able to create our Constitution which provides all the powers necessary to govern and yet leaves the basic reservoir of power in the hands of the governed. Our government is one of checks and balances.

The three branches of government, and the checks which each of these branches has on the others, constitute our best insurance that the absolute power necessary to form a tyranny will never vest in any one branch.

Our Constitution—the greatest statement of the basic wisdom of the centuries ever put together for the government of man—was not created out of thin air. Its draftsmen drew upon the great law-givers of all centuries. They used those principles which the test of experience had proved. That is why it has endured and met the new and novel needs of each new generation.

Supremacy of the law, which transferred sovereignty from ruler to the ruled, has guaranteed our individual freedom. "Law Day—U.S.A." must underscore and emphasize in the mind of every American this concept of legal supremacy—not the supremacy of law over ruler, alone, but the supremacy of law over force in a world which through space conquest has become too dangerous to live in without law replacing weapons as the ultimate decision mechanism to resolve disputes between nations.

There are only two alternatives to law, and they are on the one hand, terror—on the other, chaos. In a society without rules there would be no freedoms, no property rights, no protection for the weak, no basis for commerce or business or industry. Under a tyranny which knew as rules only the current whims of the tyrant, black terror would stalk and lurk, thrive and grow. The only possible counter to force would be force, and freedom and justice would have no place. The foundation and matrix of our free society, the protection of individual security, the basis for our accumulation of personal possessions, our development of our talents, our pursuit of knowledge, and our right to enjoy life, are the law.

We tend to take too much for granted the great principles which underlie our system of government. We have a legal system which, in spite of the size of our country and the necessary complexities of its organization, assures for the average citizen more vigorous protection for life and person, more widespread justice, more equality under law, more effective protection for individual rights, more evenly distributed economic opportunity, more security in person and property, and greater personal freedom, than any other system yet developed in all the history of mankind. What more meaningful proof is there that life under the rule of laws assures the best existence yet devised by man?

In this era when dictators have supplanted law with force in captive nation after captive nation, preservation of the ideals of individual human rights and equal justice under law will require much of us who now enjoy it. We shall have to love liberty as passionately, cling to our ideas as stubbornly, respect law as deeply, and place our faith in divine guidance just as firmly as did our inspired pioneer forefathers who founded a nation in freedom.

It is upon leadership that our future depends. And leadership of the mind is all-important in this era of dramatic change and progress. Leadership in instilling in our own people such an appreciation of what life under the rule of law means that they will help us lawyers in selling the rule of law to the peoples of the whole world as mankind's best hope for survival in the space age. Our offer of leadership to the world must be more than bigger and better weapons or missiles—we must tell the people of the whole world that we who glorify the rule of law at home will step out on the path of progress and lead toward a "law-ful" and peaceful existence for the world community, and for the unknown and unexplored frontiers of space as well.

Let us pledge each other, here and now, to rededicate ourselves to our most solemn responsibility, the responsibility of preserving and passing on to the generations which will follow us as citizens of the United States of America the heritage of individual human freedom and equal justice under law which has been ours and which rightfully must be theirs. And let us pledge ourselves to meet the challenge to the rule of law which our shrunken world and the space age encompass. Such a rededication and such a pledge must be the meaning to the legal profession of "Law Day—U.S.A."

Let us be ever aware that the seat of the law is a throne of purest justice and her crowning glory is a wreath of truth. In the words of Daniel Webster: "The Law: It has honored us, may we honor it."

Make Your Hotel Reservations Now!

The Eighty-First Annual Meeting of the American Bar Association will be held in Los Angeles, California, August 25-29, 1958. Information with respect to the schedule of Section meetings appears at page 49 in the January, 1958, issue of the JOURNAL.

Attention is called to the fact that many interesting and worthwhile events of the meeting will take place on Sunday, August 24, preceding the opening sessions of the Assembly and the House of Delegates on Monday, August 25.

Requests for hotel reservations should be addressed to the Reservation Department, American Bar Association, 1155 East Sixtieth Street, Chicago 37, Illinois, and should be accompanied by payment of the $10.00 registration for **each lawyer** for whom a reservation is requested. Be sure to indicate three choices of hotels and give us your definite date of arrival as well as probable departure. All space in the Statler, Ambassador and Biltmore Hotels is now exhausted. Sleeping accommodations are still available in the following hotels: Alexandria, Beverly Wilshire, Chapman Park, Commodore, Gaylord, Hayward, Hollywood Plaza, Hollywood Roosevelt, Mayflower, New Clark, Park Wilshire, San Carlos, Savoy Plaza and Teris. Reservations will be confirmed approximately ninety days before the meeting convenes.

More detailed announcement with respect to the making of hotel arrangements can be found in the January issue of the JOURNAL at page 50.

Missiles and Satellites:

The Law and Our National Policy

by **John Cobb Cooper** • ***Former Administrator, American Bar Foundation***

In the Middle Ages, the earth was the center of the universe about which the sun and moon, the planets and the other stars moved in obedience to the will of God. Today, the earth has shrunk to a small rock travelling around one of the minor stars in the Galaxy according to some divine law that seems more miraculous and is certainly more mysterious than any medieval metaphysics. Just as the Copernican system revolutionized man's notions of the physical world in which he lives, rockets and artificial earth satellites are about to revolutionize our concept of the law relating to national boundaries and national jurisdictions. In an address before the Atlanta Regional Meeting, February 22, Mr. Cooper explores the legal aspects of outer space travel. His address demonstrated that the old question, "How high is up?" is no longer facetious but that it has, in fact, become an international problem of the first magnitude.

The conquest of space is moving rapidly forward, paced by science and spurred on by national rivalries. But the law has lagged dangerously behind.

V-1 and V-2 missiles appeared toward the end of World War II, but few appreciated their significance as the beginning of a new era.

The air power of the United States was then unequalled. But it is now apparent that the Soviets had already begun careful preparation for the future. Twelve years ago in 1946 the *Information Bulletin* issued by the Soviet Embassy in Washington, on the occasion of the Russian "Aviation Day", said:

> Development of the industry is proceeding in accordance with the aim that Soviet aircraft must fly higher, faster, and further than any others, and that the Soviet plane industry must lead that of the world.

That aim still stands. Air power is, in the last analysis, the ability of a nation to fly. General William Mitchell said in 1925 that "Air power may be defined as the ability to do something in the air." General H. H. Arnold, as Commanding General of the U.S. Army Air Forces, summed up the situation in his final report at the end of the last war as follows:

> Air power is not composed alone of the war-making components of aviation. It is the total aviation activity, civilian and military, commercial and private, potential as well as existing.

This I believe the Soviets have always understood.

In 1955 the United States announced its plan to launch man-made satellites in aid of the International Geophysical Year. The Soviet Government made a similar announcement, doubtless still mindful of the fundamentals of air power and of the policy that "Soviet aircraft must fly higher, faster and further than any others." The man-made satellite and rockets required for its launching, whether designed for scientific or military use, are products and instruments of air power.

No concealment was made of the ultimate objective. In the issue of *Pravda* published June 1, 1957, the President of the Russian Academy of Sciences, writing on the subject, "The Problem of Creating an Artificial Earth Satellite", said:

> As the result of many years of work by Soviet scientists and engineers to the present time, rockets and all necessary equipment and apparatus have been created by means of which the problem of an artificial earth satellite for scientific research purposes can be solved.

During the same month the head of the U.S.S.R. International Geophysical Year Committee advised the headquarters of that organization in Brussels that "in the Soviet Union during the International Geophysical Year the first launching of a man-made satellite for scientific purposes will be made". On October 4, 1957, this publicly stated program culminated in the successful launching of Sputnik I. The technical and scientific methods employed have not been disclosed, but the objective was never concealed.

A month later the second Russian satellite was launched and eventually our American Explorer. Today Sputnik II and Explorer are circling the earth at the tremendous speed of 18,000 miles per hour. These successful satellite launchings prove beyond question the development of rockets of enormous power and thrust capable also of launching missiles with nuclear warheads.

The Soviet Government claims to have developed an intercontinental missile with a range of 5,000 miles. The Soviet land mass includes about one sixth of the land surface of the earth. From selected launching sites in that vast area missiles with a 5,000 mile range can reach almost any point on four continents: North America, including Alaska, Canada, the United States and most of Mexico; all of Europe; all of continental Asia, together with Japan, Ceylon and Indonesia; all of Africa south to Johannesburg.

The development of air power and scientific progress have loosed forces which, uncontrolled, may well destroy the civilization which has created them. These forces are today beyond the rule of law. This should be of equal concern to the lawyers, as well as to the military experts and policy makers.

Present Status of the Law

Certain rules must be considered in determining the relationship of the law to the flight of guided missiles and satellites. The first of these deals with *the nature of such instrumentalities of flight.* The regulations adopted by the International Civil Aviation Organization for the control of international flight apply to aircraft and to aircraft only. These are defined as including "all machines which can derive support in the atmosphere from reactions of the air". Satellites and rockets do not depend for their support upon the presence of gaseous air. Nor do rocket motors require the presence of gaseous air as a source of the oxygen needed for combustion; rocket fuels are self-contained. It is true that in 1926 the United States in the Air Commerce Act defined aircraft to mean "any contrivance now known or hereafter invented, used or designed for navigation or flight in the air". In my judgment, the United States cannot insist upon this somewhat broader definition of aircraft when dealing with international flight because it has accepted without objection the definition proposed by the International Civil Aviation Organization, and now included in one of the applicable annexes to the Chicago Convention of 1944, to which the United States is a party, and which is the only widely accepted convention regulating international flight.

The International Civil Aviation Organization has power to submit amendments to this annex and might broaden its definition to include rockets, missiles and satellites. But this would not cure the basic difficulty. The Soviet Union and a few other countries are not parties to the Chicago Convention and therefore are not bound by the rules and regulations of the International Civil Aviation Organization. I submit to you, therefore, that *there are no presently enforceable international flight regulations covering the use of rockets, guided missiles, satellites or eventual space-ships, while in flight beyond the territory of a sovereign state.*

The second rule to be considered is *the extent to which a state may control flight into, through or above its own territory.*

Under currently accepted international law, so I insist, every sovereign state has complete and absolute right of control of all transport activities in its territory and has the sole right to determine what foreign instrumentalities may be permitted to enter. It should be of interest to American lawyers to recall that the United States contributed much toward the clarification and acceptance of this rule. I have in mind particularly the cogent opinion of Chief Justice Marshall in the celebrated case of the *Schooner Exchange,* in which he said in 1812 (7 Cranch 116) that all exceptions "to the full and complete power of a nation within its own territory must be traced to the consent of the nation itself". I also have in mind the vigorous rejection by Monroe as Secretary of State of the protest made by the Spanish Minister when the Spanish Government sought to challenge the right of the United States to decide what ships under which flags might be permitted to enter our ports.

The real problem therefore that arises is: What do we mean by the *territory* of a state? It is now accepted doctrine that such territory is in fact three-dimensional, including the lands, territorial waters within its surface recognized boundaries, and also the "airspace" above. In the first great international aviation convention, the Paris Convention of 1919, which was signed although not ratified by the United States, Article I provided that "Every Power has complete and exclusive sovereignty over the air space above its territory."

Kelsen, in his classic work, *General Theory of Law and State,* discussing this article, said:

> The territory of a State is usually considered as a definite portion of the earth's surface. This idea is incorrect. The territory of the State, as the territorial sphere of validity of the national legal order, is not a plane, but a space of three dimensions. . . . The space above and below [the surface] belongs legally to the State as far as its coercive power . . . extends.

Kelsen carefully limited the geographical extent upward of the territorial area of a state in space by insisting that the "air space . . . which is beyond the effective control of the territorial State has the character of no State's land". But he added that the territorial state below had the exclusive international right to extend its jurisdiction upward as its technical means progressed.

Under the Air Commerce Act of 1926, the subsequent Civil Aeronautics Act still in force, and through ratification of the Chicago Convention of 1944, the United States has asserted its complete and exclusive sovereignty in the airspace above it—in other words, that such airspace is part of its territory.

The U.S.S.R. is not a party to the Chicago Convention, but for years it has by statute and otherwise also asserted its sovereignty in the airspace over its lands and waters and has vigor-

ously enforced its right as territorial sovereign in such areas to determine what, if any, foreign instrumentalities may be permitted to enter its airspace. In fact, this is the asserted position of almost every state in the international community, and certainly of every state that is a member of the United Nations.

The present chaotic condition of the law applicable to the flight of rockets, guided missiles and satellites stems from the fact that neither in the Paris Convention of 1919, nor in the present Chicago Convention of 1944, nor in national legislation is there any definition of what is meant by "airspace".

Some years ago I suggested the term "flight-space" for future international treaties to include so much of universal space above the surface of the earth as is now used or hereafter to be used as the area in which flight takes place, defining "flight" as movement through space of man-operated and man-controlled devices or instrumentalities such as balloons, dirigibles, airplanes, rockets, guided missiles or space-ships. Satellites would, of course, be included. This term "flight-space" was recently revived by Dr. Cheng of the University of London, who said that flight-space should consist of two parts: namely, *airspace* and *outer space*. This emphasizes our present dilemma: Where is the boundary between airspace as part of the national territory of the state below and outer space beyond?

I am convinced, as I have said previously on several occasions, that the term "airspace" in the Paris Convention of 1919 and in the Chicago Convention of 1944 was there meant to include only those parts of the atmosphere above the surface of the earth where gaseous air is sufficiently dense to provide aerodynamic lift for balloons and airplanes, the only types of aircraft in existence when those conventions were drafted. However, I have also said and wish to repeat that nothing in the Chicago Convention precludes the possibility of state sovereignty being extended by international agreement or unfortunately by unilateral force above the area in which such airplanes and balloons can be used, but there is certainly no basis on which any customary international law can as yet be considered applicable to such higher areas.

The problem has been further complicated very recently by an official announcement of the planned construction of a new American aircraft to be known as X-15. In a statement before the Preparedness Investigating Subcommittee of the Senate Armed Services Committee, James H. Douglas, Secretary of the Air Force, said that the Air Force had been engaged in explorations of outer space and associated technical fields since the end of World War II. Noting that with aircraft X-1, man in 1947 first exceeded the speed of sound, and with X-2 first soared to altitudes of more than twenty miles, he then said:

> The current model of these aircraft under development is the X-15, which should permit man to fly at speeds greater than one mile each second and at altitudes above 100 miles. I recount this continuity of development efforts to illustrate the fact that there is no easily recognized boundary between the atmosphere and space. The one merges into the other and we must learn to use both. The techniques and actual developments involved in the X-15 are one path to man's flight into space. The X-15 is a step towards a manned satellite.

So it seems that we are now constructing a flight instrumentality which will move through our territorial airspace in which we have the sole right to control flight, and then into areas beyond. Sputnik I and Sputnik II in their orbits approached within approximately 125 miles of the earth's surface. X-15 will move into the same areas.

We have no rule of law, national or international, to govern such flights beyond the atmosphere. Unless this situation be rectified, chaos is before us.

Policy: National and International

The United States and the other nations in the international community must, without delay, answer these questions: Where is the upper boundary of the territorial airspace? What control shall be agreed upon as to flight in areas beyond? These are policy decisions. If taken unilaterally by any powerful state, grave conflict may result. The international community must act, and act promptly.

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In my judgment, international conduct during the past three years is leading to the acceptance of the rule that those areas of space which may be termed outer space, where there is not atmosphere of sufficient density to create drag or otherwise affect flight, are beyond the sovereignty of any state. Such course of dealing includes, among other things, the following:

(1) The announcement by the United States and the U.S.S.R. of their respective programs for satellite flight in aid of the International Geophysical Year. So far as I am advised no state above whose territory such flights would take place made any protest, and many states participated in the scientific committees dealing with the subject.

(2) Neither the United States nor the U.S.S.R., to my knowledge, asked formal consent from all the states over which such flights would proceed—although such consent would undoubtedly have been requested and required by international law had such flights been planned to take place in the "airspace".

(3) President Eisenhower in his January, 1957, State of the Union Message stated that the United States was willing to enter into any reliable agreements which would mutually control outer space missile and satellite development, followed by disarmament proposals including an inspection system to assure that outer space would be devoted exclusively for peaceful and scientific purposes.

(4) Sputnik I, Sputnik II and Explorer were launched in their several orbits. They probably passed over the surface territory of every important state in the international community. I have been able to find no record that any state has protested that such flights have violated their territorial rights.

(5) First the Political Committee and then the Assembly of the United Nations, in the latter part of 1957, adopted a resolution that the Disarmament Subcommittee should give priority to reaching a disarmament agreement to include an inspection system designed to ensure that the sending of objects through outer space would be exclusively for peaceful and scientific purposes.

(6) In President Eisenhower's historic January 12 letter to Marshal Bulganin, he stated that he was making a proposal to solve what he considered to be "the most important problem that faces the world today", and then proposed that "we agree that outer space should be used only for peaceful purposes".

It seems to me that all of these things lead to but one conclusion: namely, that the great areas of space beyond the atmosphere are being dealt with on the basis that they are beyond the territorial sphere of any single sovereign state. This should be confirmed by a formal international agreement, vesting in some international body the power to control and regulate flight in the areas in question.

My major difficulty is that immediately above the areas of admitted national sovereignty—that is, where sufficient gaseous atmosphere exists to provide aerodynamic support for aircraft and balloons—lies an area in which there appears to be sufficient gaseous atmosphere to affect flight. For example, the data furnished me by the Mullard Radio Astronomy Observatory in Cambridge, England, indicate that the minimum height of the original orbits of both Sputnik I and Sputnik II was only about 125 miles above the earth's surface, and that the orbit time of both Sputniks decreased initially each day—indicating a decrease in the maximum height of the satellite flight daily. In other words, both of these satellites came sufficiently close to the earth to be subject to drag. I do not think that we yet have sufficient scientific information from the Geophysical Year to determine whether all of this drag or a substantial part of it was caused by the presence of gaseous atmosphere. However, if, as now seems to be the case, it is found that the satellite Explorer, whose minimum orbit height above the surface of the earth is somewhat beyond 200 miles, is not materially changing its flight time daily, then it might well be argued that somewhere in the area between 125 and 225 miles above the earth's surface the atmosphere ceases to have any appreciable effect on free satellite flight.

Before Sputnik I was launched, in fact in 1956, I suggested to the American Society of International Law the basis for a policy decision to be incorporated in a new international agreement as follows:

> Reaffirm Article I of the Chicago Convention, giving the subjacent state full sovereignty in the areas of atmospheric space above it, up to the height where aircraft, as now defined, may be operated; such areas to be designated "territorial space";
>
> Extend the sovereignty of the subjacent state upward to 300 miles above the earth's surface, designating this second area as "contiguous space" and provide for a right of transit through this zone for all non-military flight instrumentalities, when ascending or descending;
>
> Accept the principle that all space above "contiguous space" is free for passage of all instrumentalities.

This suggestion was made in the light of then available scientific data which appeared to indicate that future satellite flight would be practical only if conducted not less than 200 or 300 miles above the surface of the earth. At the same time I stated that the main problem was that agreement should be reached regarding the status of space above the territorial space covered by the Chicago Convention, but that we may not yet have the physical and scientific information needed to reach immediately the soundest decisions and that it would be unfortunate if international rules of future high altitude flight control were adopted based on incorrect theories as to the physical characteristics and usefulness of various areas in the upper atmosphere and beyond.

As recently as February 8, 1958, John G. Diefenbaker, Prime Minister of Canada, in an address before the midwinter meeting of The Canadian Bar Association, when urging that an international agency to control outer space should be named by the United Nations, repeated the suggestion as to three zones which I had made in 1956—without, of course, in any way committing himself or his government as to a final decision.

As to the extent of the territorial airspace, it has been suggested recently—particularly by A. G. Haley, General Counsel of the American Rocket Society and President of the International Astronautical Federation—that territorial airspace should be considered as extending upward to a point where there is not sufficient gaseous atmosphere left to contribute in any way toward aerodynamic lift. This point is approximately fifty miles above the surface of the earth—about twice as far upward as any aircraft has yet penetrated. This is again a matter which might well be settled by future international agreement.

Sir Leslie Munro, the Ambassador from New Zealand to the United States, and now President of the General Assembly of the United Nations, in an address before the New Jersey State Bar Association on November 22, 1957, said: "As to the actual convening of states on problems raised by recent and imminent ventures into outer space, I believe that the United Nations is the proper forum for necessary discussion." With this view I fully concur.

On January 31, 1958, Kenneth B.

Keating, Member of Congress from New York, speaking before the annual meeting of the New York State Bar Association, made the following able proposal:

> I urge that the United States take the lead in formalizing international recognition of freedom of outer space. Specifically, I recommend the following three point program for international action:
>
> First, an immediate declaration that outer space is not subject to appropriation by any nation. This "Freedom of Outer Space" declaration could pave the way for peaceful cooperation among all nations to best utilize the treasures of these unexplored regions.
>
> Second, I propose an international agreement barring the use of outer space for any military purpose.
>
> Third, an existing international agency should be adopted or a new one formed for the joint exploration of outer space.
>
> Such a program is urgently needed to promote a universal dedication to the development of outer space for peaceful, scientific and humanitarian objectives.

Conclusion

May I therefore summarize the present situation as follows:

(1) Rockets, high altitude guided missiles, satellites and future spaceships are not aircraft and their flight is not governed by any existing agreement or regulation.

(2) States have sovereignty in the airspace above their surface territories and the right to control flight therein. This airspace includes only areas where sufficient gaseous atmosphere exists to provide aerodynamic lift for such flight instrumentalities as balloons and aircraft.

(3) Rockets, guided missiles and satellites are actually being used today in areas of "outer space" beyond the territorial sphere of any state, entirely unregulated, and beyond the rule of law.

(4) No agreement exists as to where the boundary is between the territorial airspace of a state and outer space beyond—nor as to the legal status of the intermediate area lying between the territorial airspace and outer space, in which intermediate area the presence of a certain amount of gaseous atmosphere may cause the fall of flight instrumentalities, thus endangering the state below.

(5) Only the United Nations has sufficiently broad international membership to be used as the forum to determine the extent of future international agreement as to the area included in the territorial airspace of sovereign states, and how, when and where control should be vested to assure that outer space is used solely for peaceful and scientific purposes.

These are problems which the American lawyer can no longer afford to disregard.

The President's Page

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thought and its great individuality, is as one in this endeavor. For once, we lawyers will, in effect, all be arguing on the same side of the strongest "case" we could possibly present in any forum at any time. Let us hope that we will do our task so well and that the success of "LAW DAY—U.S.A." will be so outstanding that the people of the whole world will take notice that the people of the United States are in this way sending them a message reaffirming our belief in our system of individual human freedom under the rule of law.

This throwing of the spotlight upon law can well serve as a turning point in the history of our nation. It should help end some of the existing uncertainty attributable to the technological achievements of the Soviet Union. It should give the world the comforting reassurance that the American people still believe in the law—the keystone of our greatness—and our concept of individual human freedom. No scientific or other achievement should be allowed to dim or impair that belief as no other system provides that freedom which our people cherish and which the tragedy of Hungary illustrated once again is the great objective of all peoples everywhere.

April 15 through May 1 will serve as the dates for a tremendous drive to push the membership of the American Bar Association past 100,000. In honoring the law on "LAW DAY—U.S.A." there will be work for every lawyer. But we need further the assistance of every lawyer as a working member of the American Bar Association. In a society whose complexities and demands upon the rule of law grow almost daily, our Association needs this increased manpower, finances and prestige, to meet our ever growing duties and responsibilities. We should not hesitate to urge every lawyer in our country to become one of us and aid us in our work by joining the American Bar Association in this and all of our other efforts for the improvement of our profession and for increased service to the public.

No apology is offered for linking this strengthening of our profession in this way and "LAW DAY—U.S.A." We must never forget that in a strong legal profession lies the liberty of the people of the United States, and in the liberty of our people lies the hope of the world.

The NATO Status of Forces Agreement: Legal Safeguards for American Servicemen

by Howard S. Levie • *Colonel, Judge Advocate General's Corps, United States Army**

The *Girard* case aroused more public interest in a legal question than all but a few of the most controversial decisions by the Supreme Court, and yet the criticism of the law involved in the *Girard* case was directed almost entirely at the State Department and the Department of Defense and toward the question of the wisdom of United States participation in the Status of Forces Agreement with Japan. Colonel Levie's article is concerned only obliquely with this aspect of the problem, however. He deals with the rights of servicemen under the NATO Agreement (which is the model for the agreement with Japan) and he compares their rights under the Agreement with the rights they would have under the laws of the various states of the Union.

Much has been written and said with respect to the criminal jurisdiction provisions of the NATO Status of Forces Agreement.[1] However, most of those who have concerned themselves with this subject have elaborated on the question of the wisdom (or lack thereof) of the United States in entering into such an agreement,[2] its necessity in the light of customary international law,[3] its constitutionality,[4] its over-all operation,[5] etc. This article will be concerned with a different aspect of the problem. Let us assume that a soldier, sailor or airman of the United States Armed Forces who is stationed in a NATO country is accused of committing an offense which is clearly within the primary jurisdiction of the host country. What legal safeguards does the agreement contain which will insure him a fair trial according to United States standards? What additional procedures has the United States been able to evolve for the protection of its military personnel who are tried in the courts of NATO countries? How have these measures operated in actual practice? These are the problems which this article will attempt to elucidate.

In giving its advice and consent to the ratification of the NATO Status of Forces Agreement the Senate prescribed two procedures aimed at insuring that persons subject to the military law of the United States who are tried in the courts of other NATO countries would receive fair trials according to United States standards.[6] First, it is provided that when a person subject to United States military jurisdiction is to be tried by a receiving state, the military commander concerned shall "examine the laws of such state with particular reference to the procedural safeguards contained in the Constitution of the United States" and if, as a result of such examination, he determines that under all the circumstances there is danger that the accused will not be protected because of the absence or denial of such constitutional safeguards, he is directed to request the receiving state to waive its primary right to exercise jurisdiction and to permit the United States to exercise jurisdiction in the case—this request being a procedure specifically provided for in the agreement.[7] If such request is refused, the military commander is further directed to place the matter in diplomatic channels. Second, in each receiving state, the Chief of the Diplomatic Mission is directed to appoint a representative, with the advice of the senior United States military commander in that state, to attend each trial of United States personnel and to report any failure to comply with para-

* The views expressed herein are those of the writer and do not necessarily reflect those of the Department of the Army.

1. T.I.A.S. 2846. The following countries are presently parties to this agreement: Belgium, Canada, Denmark, France, Greece, Italy, Luxembourg, The Netherlands, Norway, Portugal, Turkey, the United Kingdom and the United States.

2. Bricker, *Safeguarding the Rights of American Servicemen Abroad*, THE JUDGE ADVOCATE JOURNAL, Bulletin No. 15 (October, 1953), page 1.

3. Re, *The NATO Status of Forces Agreement and International Law* in 50 N. W. L. REV. 349 (1955); Schwartz, *International Law and the NATO Status of Forces Agreement*, 53 COL. L. REV. 1091 (1953); *Criminal Jurisdiction over American Forces Abroad*, note in 70 HARV. L. REV. 1043 (1957).

4. Bennett and Van Kirk, *Tyranny by Treaty*, THE JUDGE ADVOCATE JOURNAL, Bulletin No. 20 (July, 1955), page 8.

5. Rouse and Baldwin, *Exercise of Criminal Jurisdiction under the NATO Status of Forces Agreement*, in 51 AM. JOUR. INTL. LAW 29 (1957); Schuck, *Concurrent Jurisdiction under the NATO Status of Forces Agreement* in 57 COL. L. REV. 355 (1957); Snee and Pye, A REPORT ON THE ACTUAL OPERATION OF ARTICLE VII OF THE STATUS OF FORCES AGREEMENT (1956); Snee and Pye, *Status of Forces Agreement: Criminal Jurisdiction* (1957.)

6. T.I.A.S. 2846, page 36.

7. Paragraph 3(c) of Article VII.

graph 9 of Article VII of the Agreement, the paragraph which contains procedural safeguards.

Before it was possible to reach any conclusion as to whether trials under the NATO Status of Forces Agreement in the courts of the various NATO countries would constitute fair trials according to United States standards, it was necessary to determine just what those standards were. The Fourth, Fifth, Sixth and Eighth Amendments to the Constitution contain the standards for trials in federal courts but inasmuch as persons subject to military law do not necessarily receive all of those protections when they are tried in a state court in this country, the establishment of the federal standard as a measure of what constitutes a fair trial in a foreign country would obviously be unrealistic, to say the least, since it would indicate an expectation that foreign sovereigns should extend to United States personnel rights to which they would not be entitled in the vast majority of criminal trials in the United States. Accordingly, it was assumed that in referring in its resolution to "the procedural safeguards contained in the Constitution of the United States" the Senate had reference to those procedural safeguards falling within the category of rights which are "of the very essence of a scheme of ordered liberty"[8] so that to abolish them would be to violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental".[9] In other words, it was assumed that the Senate referred only to those procedural safeguards which the due process clause of the Fourteenth Amendment to the Constitution of the United States has been construed as requiring in criminal trials conducted in state courts.[10]

Having reached this conclusion, which in retrospect appears to have been fully justified, it became necessary to determine those procedural safeguards which, at various times, have specifically been found to be within the purview of the due process clause. Briefly summarized, these safeguards are:

1. The right to be advised of the nature of the charges against him;[11]
2. The right to counsel;[12]
3. The right to be present at his trial;[13]
4. The right to be confronted with the witnesses against him;[14]
5. The right to protection against involuntary confessions and other unfairly obtained evidence;[15]
6. The right to a trial by an impartial court;[16] and
7. The right to a public trial.[17]

It is, perhaps, appropriate to point out at this time that the United States Supreme Court has specifically held that the following rights, although included within the first eight amendments to the Constitution, are *not* so fundamental as to fall within the purview of the due process clause:

1. Protection against search and seizure;[18]
2. Indictment by grand jury;[19]
3. Trial by petit jury;[20]
4. The privilege against judicial self-incrimination;[21] and
5. Protection against double jeopardy.[22]

It will be recalled that the Senate resolution makes reference to paragraph 9 of Article VII of the NATO Status of Forces Agreement. This paragraph contains its own "Bill of Rights" which assures to a person subject to the military law of a sending state who is to be tried in the courts of a receiving state the following specific procedural safeguards:

1. The right to a prompt and speedy trial;
2. The right to be informed in advance of the specific charge or charges against him;
3. The right to be confronted with the witnesses against him;
4. The right to have compulsory process for obtaining witnesses;
5. The right to have legal representation of his own choice;
6. The right to have the services of a competent interpreter;
7. The right to communicate with a representative of his government; and
8. Normally, the right to have a representative of his government present at his trial. (While there is a limitation on this right, its sole purpose is to permit compliance with local laws authorizing a court to bar the public from trials involving security or morals.[23] There has been only one case in which the United States ob-

8. Cardozo, J., in *Palko* v. *Connecticut*, 302 U.S. 319, 325, 82 L. ed. 288, 58 S. Ct. 149 (1937).

9. Cardozo, J., in *Snyder* v. *Massachusetts*, 291 U.S. 97, 105, 78 L. ed. 674, 54 S. Ct. 330 (1934).

10. Memorandum of the Interservice Legal Committee, November 17, 1953 (printed in the Hearings before the Committee on Foreign Affairs, House of Representatives, 84th Congress, 1st Session, on H. J. Res. 309, pages 249-256).

11. *Snyder* v. *Massachusetts*, *supra*, note 9; *Smith* v. *O'Grady*, 312 U.S. 329, 334, 85 L. ed. 859, 61 S. Ct. 572 (1941).

12. *Powell* v. *Alabama*, 287 U.S. 45, 68-69, 77 L. ed. 158, 53 S. Ct. 55 (1932); *In re Oliver*, 333 U.S. 257, 275, 92 L. ed. 682, 68 S. Ct. 499 (1948); *Melanson* v. *O'Brien*, 191 F. 2d 963, 967 (1951). But see *Betts* v. *Brady*, 316 U.S. 455, 471, 86 L. ed. 1595, 62 S. Ct. 1252 (1942), where Roberts, J., said: ". . . we are unable to say that the concept of due process incorporated in the Fourteenth Amendment obligates the States, whatever may be their own views, to furnish counsel in every such case. Every court has power, if it deems proper, to appoint counsel where the course seems to be required in the interest of fairness."

13. *Snyder* v. *Massachusetts*, *supra*, note 9, where Cardozo, J., said (at pages 107-108): "So far as the Fourteenth Amendment is concerned, the presence of a defendant [at the trial] is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." See also *Diaz* v. *United States*, 223 U.S. 442, 455, 56 L. ed. 500, 32 S. Ct. 250 (1912).

14. *West* v. *Louisiana*, 194 U.S. 258, 263, 48 L. ed. 965, 24 S. Ct. 650 (1904); *Stein* v. *New York*, 346 U.S. 156, 195, 97 L. ed. 1522, 73 S. Ct. 1077 (1953). However, in the latter case the Court, by Jackson, J., said (at page 196): "The hearsay-evidence rule, with all its subtleties, anomalies and ramifications, will not be read into the Fourteenth Amendment."

15. *Brown* v. *Mississippi*, 297 U.S. 278, 286-287, 80 L. ed. 682, 56 S. Ct. 461 (1936); *Chambers* v. *Florida*, 309 U.S. 227, 228, 84 L. ed. 716, 60 S. Ct. 472 (1940); *Rochin* v. *California*, 342 U.S. 165, 173, 96 L. ed. 183, 72 S. Ct. 205 (1952).

16. *Tumey* v. *Ohio*, 273 U.S. 510, 523, 71 L. ed. 749, 47 S. Ct. 437 (1927); *In re Murchison*, 349 U.S. 133, 136, 99 L. ed. 942, 75 S. Ct. 623 (1955).

17. *In re Oliver*, *supra*, note 12, at page 278. In *Melanson* v. *O'Brien*, *supra*, note 12, at page 965, the Court of Appeals for the First Circuit, indicated that a state statute could, without violating due process, authorize a trial judge to exclude the general public from a trial involving a sex offense.

18. *Wolf* v. *Colorado*, 338 U.S. 25, 33, 93 L. ed. 1782, 69 S. Ct. 1359 (1949); *Irvine* v. *California*, 347 U.S. 128, 132-133, 98 L. ed. 561, 74 S. Ct. 381 (1954).

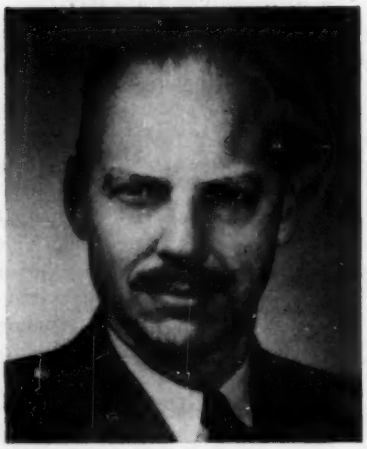
19. *Hurtado* v. *California*, 110 U.S. 516, 538, 28 L. ed. 232, 4 S. Ct. 111 (1884); *Maxwell* v. *Dow*, 176 U.S. 581, 584-585, 44 L. ed. 597, 20 S. Ct. 448 (1900); *Gaines* v. *Washington*, 277 U.S. 81, 86, 72 L. ed. 793, 48 S. Ct. 468 (1928).

20. *Maxwell* v. *Dow*, *supra*, note 19, at pages 602-603; *Frank* v. *Mangum*, 237 U.S. 309, 340, 343, 59 L. ed. 969, 35 S. Ct. 582 (1915); *Brown* v. *Mississippi*, *supra*, note 15, at page 285.

21. *Twining* v. *New Jersey*, 211 U.S. 78, 112-114, 53 L. ed. 97, 29 S. Ct. 14 (1908); *Snyder* v. *Massachusetts*, *supra*, note 9, at page 105; *Adamson* v. *California*, 332 U.S. 46, 54, 91 L. ed. 1903, 67 S. Ct. 1672 (1947). In the *Twining Case* the Court said: ". . . In *Missouri* v. *Lewis*, 101 U.S. 22, Mr. Justice Bradley, speaking for the whole court, said, in effect, that the Fourteenth Amendment would not prevent a State from adopting or continuing the civil law instead of the common law. This dictum has been approved and made an essential part of the reasoning of the decision in *Holden* v. *Hardy*, 169 U.S. 387, 389, and *Maxwell* v. *Dow*, 176 U.S. 598. The statement excludes the possibility that the privilege [against judicial self-incrimination] is essential to due process, for it hardly need be said that the interrogation of the accused at his trial is the practice in the civil law."

22. *Palko* v. *Connecticut*, *supra*, note 8, at page 328; *Brock* v. *North Carolina*, 344 U.S. 424, 428, 97 L. ed. 456, 73 S. Ct. 349 (1953).

23. For a summary of the laws relating to public trials in each of the NATO countries, see *Hearings before the Committee on Foreign Affairs, House of Representatives*, 84th Congress, 1st Session, on H.J. Res. 309, pages 354-355. For what is probably the rule in this country, see comment on *Melanson* v. *O'Brien*, *supra*, note 17.



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server has been barred from the trial of a person subject to United States military law, even including the few sex cases from which the general public has been barred. That case, which occurred in the United Kingdom, involved a trial in a juvenile court. The charges were later dropped but the case was, nevertheless, called to the attention of the local authorities.)

It has already been noted that the Senate resolution, in its first aspect, called upon the commander concerned to examine the laws of the country in which a trial was to take place in order to determine whether there was danger that the accused would not be protected because of the absence or denial of safeguards contained in the Constitution of the United States. Having determined what those procedural safeguards are, and having seen which of them are specifically guaranteed by the treaty itself, the next step was to examine the laws of the various NATO countries in order to ascertain the extent to which they include or omit the other procedural safeguards of the due process clause. It is beyond the purview of this article to review and discuss the criminal procedures of each of the NATO countries and to compare the safeguards therein contained with what has been determined to be due process in a state court in the United States. Suffice it to say that the military services made such a study of the laws of each of the NATO countries[24] and arrived at the conclusion that although, in many instances, the particular words of art used in this country were not used elsewhere, save perhaps in the United Kingdom, the net result was the same.[25] This does not mean that trials conducted in the criminal courts of civil law countries closely resemble trials conducted in the criminal courts of this country. There are very basic and substantial differences—but the purpose of the criminal trial in each is identical—to protect the innocent and to convict the guilty.[26] Extensive research, moreover, has failed to reveal that either the common law or civil law system is, to any meaningful extent, more or less successful in achieving that purpose than the other.[27]

Reference has already been made to the provision contained in the Agreement under which requests for waivers of jurisdiction may be made.[28] This provision requires that the state having the primary right to exercise jurisdiction give "sympathetic consideration" to a request for a waiver of its jurisdiction where the other state concerned "considers such waiver to be of particular importance." The United States military authorities consider every case in which an American serviceman may be tried by a foreign court to be of particular importance—and request a waiver in practically every case where the receiving state has the primary right to exercise jurisdiction. The procedure followed in each country is generally that which will result in the maximum number of waivers of jurisdiction by the host state. The success of this procedure has repeatedly been demonstrated by the large percentage of waivers of jurisdiction which have been obtained in the majority of the NATO countries.[29]

But the United States has not been content to rely solely on the granting of requests for waivers of jurisdiction on a case by case basis. Agreements have been negotiated with two of the

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24. See, for example, "Netherlands Law and the NATO Status of Forces Agreement. A Study prepared by The Judge Advocate Division, Headquarters USAREUR, U. S. Army." In general, see Schwenk, *Comparative Study of the Law of Criminal Procedure in NATO Countries under the NATO Status of Forces Agreement*, 35 N. C. L. Rev. 358 (1957). Studies of the procedures in criminal trials in a number of NATO countries were also prepared by the Library of Congress.

25. Just as one example, in the United States we talk of "presumption of innocence" "burden of proof", "proof beyond a reasonable doubt", etc. These terms, as such, are unknown to civil law countries—but in those countries the very same legal concepts are, in fact, to be found in the phrases "every man being counted innocent until he has been convicted", "inmost conviction", etc. This problem in semantics is well expressed at page 33 of *Netherlands Law and the NATO Status of Forces Agreement*, *supra*, note 24, where the following statement appears: "Continental legal systems are predicated upon the assumption that a criminal proceeding is not a battle of wits between the prosecution and the accused, but is rather an examination into the varied contentions of fact with a view to ascertaining the truth. Consequently, there is no presumption that an accused is innocent. On the other hand, there is no presumption that he is guilty. While differences in terminology make the continental approach to this subject a difficult subject for analysis by common-law lawyers, it may be stated as a general proposition that the prosecution must prove the guilt of the accused in a criminal trial in continental countries. . . ."

26. Meyer, *Can U.S. Troops Get Justice in Foreign Courts?* in 17 The Reporter 33 (October 3, 1957).

27. In view of the frequency with which the assertion is made that there is a presumption of guilt in foreign legal systems, as opposed to the presumption of innocence which obtains in the common law system, the following table will undoubtedly be of interest:

	Number of individuals tried	Acquittals
United States	31,811	1,176 (3.7%)
All foreign countries	4,437	275 (6.2%)
All NATO countries	3,164	210 (6.6%)
United Kingdom	2,178	121 (5.6%)
France	471	41 (8.7%)

(Data for the United States were taken from the *Annual Report of the Director of the Administrative Office of the United States Courts: 1956*, Table D4. The figures given cover the fiscal year July 1, 1955, to June 30, 1956.

(Data for countries other than the United States were taken from *Department of Defense Statistics on the Exercise of Criminal Jurisdiction by Foreign Tribunals over United States Personnel*, December 1, 1955-November 30, 1956. The figures given refer to persons subject to United States military law who were tried in the courts of the countries specified.)

28. Paragraph 3(c) of Article VII reads:

". . . The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance."

29. Complete statistics in this regard are submitted annually to the "Subcommittee on the Operation of Article VII of the NATO Status of Forces Treaty" (*sic*) of the Senate Armed Services Committee and are printed in each of the *Hearings* of that Subcommittee. The Department of Defense Statistical Report referred to *supra* at note 27 discloses the following:

	Number of cases subject to foreign primary jurisdiction	Number of cases where jurisdiction waived to U.S.
All foreign countries	14,394	9,614 (66.8%)
All NATO countries	7,460	4,095 (54.9%)
United Kingdom	2,705	502 (18.6%)
France	3,981	3,446 (86.6%)

NATO countries under which each of those countries has, in advance, promised to waive its primary right to exercise jurisdiction in every case, subject only to a right to decline to waive jurisdiction in those cases which, for some reason, are of "particular importance" to it.[30] It may be assumed that efforts to obtain similar agreements in other countries are under consideration.

The Status of Forces Agreement contains a provision to the effect that where an accused is in the custody of the United States military authorities, such custody need not be relinquished to the civil authorities of the receiving State until that State has "charged" him.[31] Literally, this means that as soon as the receiving state has indicated its intention of prosecuting by filing charges, it is entitled to custody. However, local agreements have been negotiated by the United States military authorities under which, except in very rare and unusual cases, they are permitted to retain custody of the serviceman until the completion of all judicial proceedings and under which servicemen who are originally in the custody of the police authorities of the other country are turned over to the custody of the United States military authorities until the completion of such proceedings. This is particularly important because of the very small number of individuals tried who eventually receive sentences to confinement which are not suspended.[32]

It has been mentioned above that the United States military authorities request a waiver of jurisdiction in practically every case involving the possibility of the trial of an American serviceman by a foreign court. It is for this reason that an extensive reporting system has been established by virtue of which all echelons of command are kept promptly and fully informed of pending cases and are in a position to render any necessary assistance without delay. Thus, an initial report must be submitted in every case in which a United States serviceman is in foreign pretrial custody, or in which a request for a waiver of jurisdiction has been denied, or in which thirty days have elapsed without receiving state action on a request for waiver. A second report must be submitted immediately upon completion of a trial by the receiving state, and a third report must be submitted immediately upon the completion of the appeal, if one is taken.[33] These reports are all summary in character. In addition, however, as soon after the trial (and after the appeal, if there is one) as possible, the official observer must submit a very detailed report. But before discussing the nature and purpose of this report, let us examine the role of the official observer himself.

It will be recalled that the "Bill of Rights" of the NATO Status of Forces Agreement grants to the accused the right generally to have a representative of his government present at his trial,[34] and that the Senate resolution calls upon the Chief of the Diplomatic Mission to appoint a representative with the advice of the senior military commander in the country involved, to attend each trial of a person subject to United States military jurisdiction and to report any failure to comply with the provisions of paragraph 9 of Article VII of the Agreement. It may be that the proper interpretation of the Senate resolution is that it referred only to those cases where there was danger that the accused would not be protected because of the absence or denial of the constitutional rights listed above which he would enjoy in the United States, and where a request for a waiver of jurisdiction had, for this reason, been made and refused. Nevertheless, the military authorities have an official observer present at *every* trial or appeal of any person subject to United States military law of which they are aware and, moreover, require that, except in cases of minor offenses, the observer be a lawyer.[35] The observer must submit a very detailed report of the trial or appeal.[36] In addition to such general matters as the identity of the accused, the nature of the offense charged, the identity of the court, and the result of the trial, the report must include the text of the charge, the citation and text of the statutes involved, the adequacy of defense counsel and how he was retained, the competence of the interpreter, a complete résumé of everything which transpired at the trial or appeal (including a summary of the testimony of the witnesses and a description of any real evidence offered), and, perhaps most important of all, the observer's comment on the fairness of the trial or appeal, with special emphasis on the observance of the procedural safeguards contained in the Agreement.[37] This report is scrutinized in each headquarters through which it passes, as well as in the Office of The Judge Advocate General of the military service concerned, and any irregularity results in immediate action to bring the matter to the attention of the proper authorities of the country in which the trial took place.

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30. T.I.A.S. 3174 (1954) with The Netherlands and T.I.A.S. 3649 (1956) with Greece. During the period from December 1, 1955, to November 30, 1956, the Netherlands declined to waive jurisdiction in only one case out of the 69 in which it had the primary right to exercise jurisdiction. Because of its comparatively recent date full statistics on the operation of the waiver agreement in Greece have not yet been received. However, available information indicates that the statistics in that country will parallel those of The Netherlands.

31. Paragraph 5(c) of Article VII reads:
"The custody of an accused member of a force or civilian component over whom the receiving State is to exercise jurisdiction shall, if he is in the hands of the sending State, remain with that State until he is charged by the receiving State."

32. Statistics in this regard for the same period and from the sources cited in note 27, *supra*, are as follows:

	Number of individuals tried	Sentences to confinement not suspended
United States	31,811	12,854 (40.4%)
All foreign countries	4,437	108 (2.4%)
All NATO countries	3,164	89 (2.8%)
United Kingdom	2,178	35 (1.1%)
France	471	42 (8.9%)

On October 31, 1957, a total of 32 persons subject to United States military jurisdiction were serving post-trial confinement in penal institutions in NATO countries; 22 of these were in the United Kingdom, 5 in France, 4 in Canada, and 1 in Italy.

33. Paragraph XI and Appendix B, Department of Defense Directive No. 5525.1, November 3, 1955, *Status of Forces Policies and Information*. This Directive is reprinted at pages 5-11 of the Hearings of the Senate Subcommittee, *supra*, note 29, held on February 9, 1956.

34. Paragraph 9(g) of Article VII.

35. Paragraph IX, Department of Defense Directive No. 5525.1, *supra*, note 33.

36. In some civil law countries certain appeals are, in fact, trials *de novo*.

37. Appendix B, letter from the Department of the Army, 10 April, 1956, "Procedures To Be Followed where United States Personnel Are Subject to Foreign Criminal Jurisdiction, or Confined in Foreign Penal Institutions". It should be pointed out that this procedure is not limited to NATO countries, or even to countries with which the United States has jurisdictional arrangements. On occasions servicemen have found themselves in difficulties with the law in countries where no United States troops are stationed and where they were only tourists. In such cases the military attaché, or the local American consul, either performs the functions of observer or secures the co-operation of the nearest United States military commander who provides qualified personnel for the purpose.

In only one case has resort to diplomatic representation been necessary.[38] This is not intended to convey the impression that in no other cases have the reports of the observers indicated the possibility of the need for remedial action. In one case an observer complained of the quality of the interpretation. Not only was the defect in that particular trial corrected upon the complaint of the local military authorities, but the central authorities of the government concerned advised all of the local prosecutors of the urgent necessity for a high standard of interpretation. In a case presently under consideration, the testimony of one of the most important witnesses was taken by letters rogatory. The accused was not present at the time but he was later (before trial) given an opportunity to question her. The witness had departed from the country by the time of the trial, and her testimony was read. The problem which must be resolved before any approach is made to the government of the country concerned is whether such a procedure, if followed in a state court in the United States, would violate the concept of due process in this country—not a simple problem in the light of numerous decisions of the United States Supreme Court which are related to this subject.[39] Two other questions which have been raised by observers' reports are concerned with the procedures, common to most civil law countries, under which the prosecution may appeal either from an acquittal or from a conviction when it considers the sentence to be inadequate[40] and under which trials *in absentia* are permitted.[41]

Another of the procedural safeguards contained in the NATO Status of Forces Agreement provides that the accused is entitled "to have legal representation of his own choice for his defense or to have free or assisted legal representation under the conditions prevailing for the time being in the receiving State".[42] When the agreement first became effective an accused serviceman had the alternative of obtaining counsel at his own expense or of accepting court-appointed counsel. This situation was not satisfactory because the accused was frequently not in a financial position to retain counsel at his own expense, and, although court-appointed counsel were generally of high calibre, the accused had mental reservations as to the zeal of such counsel. Accordingly, the Department of Defense initiated legislation to permit the use of appropriated funds for the payment of counsel fees, court costs, and bail in cases involving trials by foreign courts of persons subject to military jurisdiction. This legislation was enacted by the Congress in July, 1956, and implementing regulations were issued by the three services shortly thereafter.[43] Under these regulations, the authority to approve requests by accused for the provision of counsel at the expense of the United States Government has been delegated down to local commanders. Counsel are selected by and represent the individual, not the United States. The criteria for approving requests are sufficiently flexible to permit favorable consideration an all cases except those involving comparatively minor offenses.[44]

In conclusion, it would appear that if a person subject to United States military jurisdiction is tried by a civilian court of one of the NATO countries, and is convicted and sentenced to confinement which is not suspended (and, as a result, is among the slightly over 1 per cent of all such persons who commit offenses subject to the primary jurisdiction of a NATO country who eventually are compelled to undergo confinement in foreign penal institutions),[45] he will have had a fair trial by any standards, and will unquestionably deserve the punishment which he receives. In short, it is believed that the foregoing brief discussion should clearly indicate that the combination of safeguards contained in the NATO Status of Forces Agreement, those contained in the basic criminal procedures of the NATO countries themselves, and those which the United States has been able to obtain by bilateral negotiation or to create by unilateral action, taken as a composite whole, insure that any person subject to the military law of the United States who is tried in a criminal court of a NATO country will receive a fair and just trial, a trial "consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions".[46]

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38. A complete statement on this case, which involved Pfc. Jerry Baldwin, may be found on pages 21-23 of the Hearings of the Senate Subcommittee, *supra* at note 29, held on July 13, 1955. A number of cases where action was contemplated by the military authorities but was not taken because the accused was satisfied with, and did not desire to disturb, the decision of the trial court are listed on page 60 of the same Hearings. A few of the cases which have required and received considerable study, but which have been resolved without the invocation of the procedure of the Senate Resolution, are discussed at pages 18 and 19 of the Hearings of the same Subcommittee which were held on February 9, 1956.

39. See cases cited *supra* at note 14. Thus, in *West* v. *Louisiana* the Court found no denial of due process in the reading on the trial, in the absence of the witness, of testimony which had been taken at the preliminary hearing.

40. The average American will probably be aghast at such a procedure—but in *Brock* v. *North Carolina*, *supra* at note 22, the United States Supreme Court found no violation of due process in a second trial on the same charges where the first one had ended in a mistrial on the prosecutor's motion after it had become obvious that he could not then prove his case; and in *Palko* v. *Connecticut*, *supra* at note 8, it found no violation of due process in the second trial by the state of a case where the prosecutor's appeal from a conviction of murder in the second degree and sentence to life imprisonment was based upon his belief (proved correct on the retrial) that but for errors committed by the trial court the jury would have found the accused guilty of murder in the first degree and the death sentence would have been imposed!

41. See pages 36-37 of the Hearings of the Senate Subcommittee, *supra* at note 29, held on April 9, 1957. This problem has been largely resolved in France by a Ministry of Justice Circular issued to all prosecutors which calls attention to this problem and urges that appropriate action be taken to obviate the necessity for *in absentia* trials.

42. Paragraph 9(e) of Article VII.

43. P.L. 777, 84th Congress (70 Stat. 630). The Instructions issued by the Department of the Navy in implementation of this statute are reprinted at pages 5-7 of the Hearings of the Senate Subcommittee, *supra* at note 29, held on April 9, 1957. The comparable Army and Air Force implementations may be found in Army Regulations 633-55 and in a letter from Headquarters, Department of the Air Force, dated August 21, 1956, subject: "Counsel Fees".

44. Some statistics on the operation of this statute during the first few months that it was in effect are contained on page 8 of the Hearings of the Senate Subcommittee, *supra* at note 29, held on April 9, 1957.

45. As has been stated (*supra* at note 32), a few persons subject to United States military jurisdiction do end up with affirmed sentences to confinement not suspended. The protection afforded them by the military services does not cease then. Local military authorities must visit each such individual at least once every thirty days in order to ascertain the conditions of confinement and to observe other matters relating to health and welfare. To the maximum extent possible, moreover, these individuals are furnished legal assistance, medical attention, extra food, bedding, clothing, and health and comfort items. (See Paragraph XII, Department of Defense Directive No. 5525.1 *supra* at note 33.)

46. Van Devanter, J., in *Hebert* v. *Louisiana*, 272 U.S. 312, 316, 71 L. ed. 270, 47 S. Ct. 103 (1926).

Producing Great Lawyers:

Jurisprudence and Legal Philosophy

by **Joseph W. Planck** • *of the Michigan Bar (Lansing)*

In this article, Mr. Planck draws a distinction between jurisprudence, or legal science, and legal philosophy, which attempts to select the ethical values to be attained by a country's jurisprudence. Legal philosophy is much more important than jurisprudence, Mr. Planck believes, and we have paid far too little attention to it in our law schools.

Few will deny that the function of a great law school is to produce great lawyers. A great lawyer is more than a highly skilled craftsman. He is also one who has given thought to and has formed a rational and considered opinion as to the aims and purposes of the law and its relation to human values and human society.

Based on this premise, one may infer that there are very few, if any, truly great law schools in the United States today. The reason seems to be twofold.

First, there is a lack of time to teach all of the many subjects that today go to make up the corpus of the law. Taxation, administrative law and labor relations did not appear in the curriculum thirty years ago. New courses, like atomic energy law and the law of flight, will doubtless appear. There is currently a strong demand that law school training become more practical and immediate and that the student be taught how to read abstracts and draft conveyances. It is small wonder that the schools find their hands more than full in the effort to produce competent technicians on the same level that a good dental school tries to turn out good dentists.

Secondly, there appears to be a lack of understanding of the vital difference between legal science and legal philosophy. This distinction is blurred by the persistent tendency to include both the philosophy of the law and the science of the law in that high-sounding and impressive word, *jurisprudence.*[1]

To Justinian's lawyers, engaged in compiling the Corpus Juris Civilis, jurisprudence was the knowledge of things human and divine, the science of the just and the unjust.[2] To the French, the Spanish and the Italians, *la jurisprudence* means the trend or direction of the decisions of the courts as distinguished from *la doctrine,* the weight of authority on a given point of law. To most Americans, *jurisprudence* is merely a big word for law.

In writing about jurisprudence, therefore, one should select a meaning, like Humpty-Dumpty.

> "When I use a word," Humpty-Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."
>
> "The question is," said Alice, "whether you *can* make words mean so many different things."
>
> "The question is," said Humpty-Dumpty, "which is to be master—that's all."

Then, let us say, jurisprudence is the science of law. More particularly, it is the formal (essential) science of actual (positive) law.[3] In this sense, jurisprudence stands toward actual legal systems, past or present, much as grammar stands to languages. It deals only with the essential characteristics of law. The term is wrongly applied to actual systems of law or to current views of law or to suggestions for its amendment. It is the name of a science.

As legal science, jurisprudence is limited in scope as are other sciences. Science has no concern with values, with what ought-to-be. A science is merely a body of organized knowledge about a particular subject such as physics or biology or politics, the science of government. Science, by itself, cannot supply us with an ethic, with a purpose or with values. Science does not and cannot appoint the goals which men should seek or direct us to the good life or the good society. It does not and cannot determine which

1. *Cf.* John C. H. Wu, *Jurisprudence as a Cultural Study,* UNIVERSITY OF DETROIT LAW JOURNAL, March, 1956. The writer sat beside Dr. Wu in Professor Joseph Drake's seminar in jurisprudence and legal philosophy at the University of Michigan Law School in 1920. Of all the courses in law school, that one proved to be the most stimulating and rewarding, an oasis of sparkling water. True it is that the law furnishes philosophic food for philosophic minds, but the law student needs to be shown that this is so. Then is the golden moment, never to come again.

2. *Iurisprudentia est divinarum atque humanarum notitia, iusti atque iniusti scientia.* INSTITUTIONES 1, 1, 1.

3. "Jurisprudence is the formal science of positive law."—Holland, ELEMENTS OF JURISPRUDENCE (13th ed.) 13.

among many competing values are true and which are false.[4] Therefore, within our definition, jurisprudence is not concerned with ends, aims, purposes or functions of law. Such considerations are the work of philosophy.

Ask any philosopher with portfolio, "What is a philosopher?" He is apt to reply, "A lover of wisdom." Ask him next, "What, then, is philosophy?" There you have him. But write down upon a piece of paper, "What is the purpose of law?" Then stop to think about what you will put down next. You are a philosopher!

Jurisprudence . . . The Nature of Law

Jurisprudence, however, as a science, is properly concerned with the nature of law, what it is. Is it something that is made consciously, as by law-givers or judges, or is it something which is found? If found, what is it that is found? Savigny told us that law itself is subject to law, that it is no arbitrary expression of the will of a law-giver, but is itself subject to evolutionary processes, juristic forces that adjust themselves to the needs of successive ages.

Jurisprudence also studies the method of the law and compares it with the methods of other social sciences and means of social control. It notes, for example, that religion provides sanctions to compel obedience to its precepts. These sanctions usually take the form of promised reward or promised punishment in a future life. Morality, too, both rewards and punishes but does so here and now, in the form of social approval or social contempt. The law does not reward. Its method is only to punish, in the form of incarceration, compensation, prohibition or restitution.

The work of jurisprudence is caught and confined within a particular legal order, the meaning of which alone it is called upon to understand. Legal science cannot decide the comparative merits of existing legal orders, such as the civil and the common law. It cannot solve the problem of church versus state or freedom of the individual as against regulation by government or where to draw the line beyond which the welfare state should not go. These are value-judgments and are in the domain of philosophy.

One may say, "What difference does it make what name is used so long as the problems are attacked and studied?" The answer is that when the distinction is blurred, as it seems to be in much of the writing on the subject,[5] it is the need for the study of jurisprudence that is emphasized and it is legal philosophy which is scanted. And it is legal philosophy which is of far greater importance. To venture a double meaning, legal philosophy far exceeds legal science in value as a background for the practice of the law.

A study of the offerings of various leading law schools is convincing that even the study of legal science is not adequately recognized. If, indeed, there is an elective called jurisprudence, it may consist of a study of legislation or law-making, or of legal history or of comparative law. Probably there is no course in any law school dealing at all adequately with the various concepts of the aims and purposes for which laws exist among men.[6] Now and then, voices are raised crying in the wilderness for the teaching of jurisprudence in our American law schools.[7] Sometimes they include legal philosophy in their demand, but not always. In England, study of the philosophy of law seems to be non-existent.

What are the purposes or functions of the law, the ethical, human values to be sought and perchance attained?

There is one that is innate in law itself, of necessity. The law says, "Let it be this way." That means peace and order. It makes no difference whether it be the good law of a Solon or the bad law of a Hitler. The result always and primarily sought is obedience and that tends toward social peace. The common phrase "law and order" indicates the fundamental correlation. A Caligula or a Nero might indeed decree that each person might do as he willed but then a state of anarchy, of no-law, would ensue.

The law may seek certain intermediate ends and purposes, such as justice. Daniel Webster said that justice is the great purpose of the law. Legal justice was aptly defined by the civilians as the constant and perpetual wish to render to every one his due.[8] Justice is an important aim in Anglo-Saxon law, for example, but it is not universally sought. It is, therefore, not an inherent aim or purpose of the law, but is something which human beings may strive to achieve by means of law.

Freedom is sometimes spoken of as the great aim of the law.[9] But there are many freedoms—some good, some bad. The law denies to parents the freedom to keep their children permanently out of school. Why? A value-judgment is involved here. One freedom is denied in the hope that, through education, a more important freedom—that of the mind—may be achieved.

The law places curbs on freedom for the sake of freedom. As Goethe said, "Without the law, there is no liberty."[10] No one ever stated the issue better than Heraclitus of Ephesus 2,500 years ago: "The major problem of human society is to combine that degree of liberty without which law is tyranny with that degree of law without which liberty becomes license." It is in the application of this profound observation that we encounter difficulty. An ideal is needed whereby to determine where the line shall be drawn.

The law is now being made the conscious instrument of great social and economic changes. Social engineering is under way on a vast scale. Taxation is employed to level out economic inequalities. Welfare legislation to secure a large variety of material interests is

4. This is why the opinion of an atomic scientist on whether or not fission or fusion bombs should be used is merely the view of a layman.

5. In a current learned periodical, there appears the phrase, "the science of philosophy of jurisprudence".

6. University of Virginia Law School (1955-56) offers a required course in "Philosophy of Law". If a choice has to be made between legal philosophy and legal science, this is the right answer. Michigan State University, *mirabile dictu*, offers "Philosophy of Law" to undergraduates. The course is reported popular with pre-law students.

7. *Cf.* Parker, *The Good Law School: Pipe-dreams of a Lawyer from Two Continents*, 42 A.B.A.J. 12, 1123 (1956); Parker, *Jurisprudence Is Practical*, 7 WESTERN RES. L. REV. 65 (1955); Hogan, *The Need for a Course in Jurisprudence in Law Schools*, 9 JOURNAL OF LEGAL EDUCATION 2, 219 (1956).

8. "*Justitia est constans et perpetua voluntas jus suum cuique tribuendi.*"

9. "The ultimate object of positive law is identical with the proximate object of natural law—*viz.*, liberty. But being realizable only by means of order, order is the proximate object of positive law."—Lorimer, INSTITUTES OF LAW (2d ed.) 523.

"Liberty, the first of blessings, the aspiration of every human soul, is the supreme object."—Carter, LAW: ITS ORIGIN, GROWTH AND FUNCTION, 337.

10. "*Nur das Gesetz kann uns die Freiheit geben.*"

on the statute books. The welfare state, in greater or lesser degree, exists in Great Britain and the United States. The argument is that the welfare state is good for people. Should it be curbed or extended?

The answer to this must depend on the nature of man and the view one takes of his purpose or aim here on this planet and at this stage of history. For that purpose, whatever it may be, is also the ultimate purpose of the law.

The Ultimate End . . . The Well-Being of Mankind

One may say that the ultimate end and purpose of human life, and, consequently, of the law, is the physical, intellectual, moral and spiritual well-being of man. But this leaves unanswered the question, "In what does the well-being of man consist?" Such phrases as "the well-being of man" or "the good life" are useless to a legislator or a judge confronted with a concrete situation. In terms of contemporary symbolic logic, such an expression is a variable and not a material constant. It may differ with the time and the place.

Here we are at grips with a problem concerning which men have wrestled for over 2,000 years. What is the *summum bonum*—the highest good? Is it happiness? Is it duty? Is it security? Is it self-realization or some other? Whatever it is, it is also the ultimate aim and purpose of the law. Justice is a favorable environment wherein to seek such ultimate human good and freedoms are to be selected and maintained as they contribute thereto.

Such a final human value can assist us in the problem of the welfare state. Where shall the line be drawn between security provided by government and individual freedom from government? In 1854, Lincoln quoted approvingly Jefferson's declaration that "the legitimate object of government is to do for the community of people whatever they need to have done but cannot do at all or cannot do so well for themselves in their separate and individual capacities". Or are today's office-seekers right when, in return for votes, they try to make man secure from womb to tomb, from obstetrician to mortician, and appeal in every possible manner to the cupidity and laziness of the citizenry? American pioneers of two hundred years ago said to government, in effect, "Protect us from the red-coats and the red Indians, but beyond that, leave us alone." That is not possible today. Human society is too complex. But too much paternalism is bad for the man as it is bad for the boy.

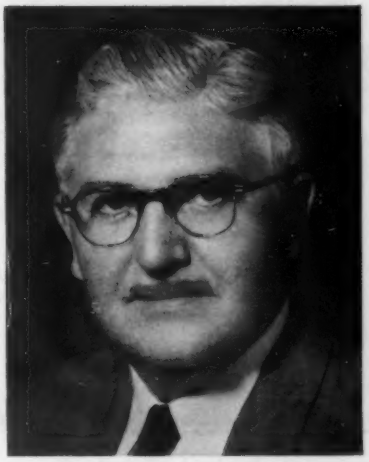
If security and safety, so far as can be, from the perils and ills of human life on this planet, is the ultimate good, then let us promote further the welfare state. If, on the other hand, the purpose is self-realization, the opportunity to do what a person is capable of doing and to become what he is capable of becoming, then one should be left free, so far as may be, to paddle one's own canoe, in order to develop the sturdy pioneer virtues of courage and self-reliance.

A great lawyer must have some knowledge of legal science in order to understand the nature of law, its method and its primary aim of peace and order. He must be acquainted with the philosophy of law to perceive its intermediate ends of liberty and justice and the material interests which modern society seeks to achieve by means of law. Beyond all these, he must have formed a personal viewpoint as to the ultimate purpose of the law, which is identical with the final, the ideal aim and purpose of men and women on the earth.

Legal philosophy, unlike legal science, is not a closed system. It does not resemble a lake or pond which has no outlet. Rather is it a stream of living water which for awhile goes about its own affairs but unites at last with many, many others to form a great river—the philosophy of mankind. It is at this point that legal philosophy merges and becomes one with the philosophy of education, with the philosophy of economics and of history and the other social sciences. The philosophy of the law is but one phase of the philosophy of human values. The ultimate purpose of education, for example, is also to promote the well-being of man.[11] So we see that legal philosophy differs from philosophy of education and the other social sciences in its primary and secondary aims and purposes but unites at last with other disciplines in the search for an ultimate ideal.

A fundamental change in the objectives and methods of legal education is long overdue. Can the law schools give the required time to legal science and philosophy? They can if they deem these studies important enough and they are truly so. It has been noted that legal science has been overemphasized at the expense of legal philosophy.[12] A law-school dean may well take a look at the subject of legal science and conclude that it is not entitled to displace very much in the

(Continued on page 332)



Joseph W. Planck is a former President of the State Bar of Michigan (1951-1952) and is a member of the Michigan Board of Bar Examiners. A native of Union, Michigan, he received his A.B. from the University of Michigan in 1918 and his LL.B. in 1921. He has practiced in Lansing ever since being graduated from law school.

11. Perhaps the primary purpose of education is the acquisition of knowledge and mental training. Certainly, an intermediate aim is freedom of the mind, the most important of all freedoms. The final purpose of both education and law is one and the same. True, there is no agreement among philosophers as to this ultimate good. But each person makes his choice, consciously or not, intelligently or not, every time he decides between one thing and another, one course of action and another.

12. This may possibly be due to the great weight and influence of Dean Roscoe Pound. Dean Pound became the American prophet of *Interessen-jurisprudenz*, the advocate of social-engineering to secure for each one his interests, so far as can be with due regard to the interests of others. But as some one has

Annual Meeting of the Fellows—

A Notable Occasion in Atlanta

by **John C. Leary** • ***Deputy Administrator of The American Bar Foundation***

The Second Annual Meeting of The Fellows of the American Bar Foundation in Atlanta, February 22-23, was a dramatic demonstration of the character, purpose and vigor of that organization, which is composed of dedicated Bar leaders, selected from every state and territory to counsel and lend encouragement and support to the educational and research program of The Foundation. Some 400 Fellows and their ladies convened at the Atlanta-Biltmore Hotel for a memorable two-day program of professional consultations, inspirational addresses and conviviality.

Chairman E. Smythe Gambrell, in his preliminary remarks at the opening session, stated:

> The Fellows of the American Bar Foundation provides an arena and vehicle in and through which good lawyers, who are good fellows with a lively sense of social responsibility, may work and play together. And we emphasize the importance of the wives to our annual meetings. We hope that, as we foregather from year to year, we shall not only accomplish some worthwhile things for the improvement of law and its administration, but also develop some precious friendships which will brighten the days that are left to each of us. We cannot ignore the contagious interest of comradeship. Surely there must be something to the touch of the hand and the sound of the spoken word.

Saturday was given over to sightseeing, including the world famous Cyclorama, the numerous colleges and universities, the governmental and business centers and the unique residence sections of Atlanta. The visitors enjoyed a hearty buffet luncheon between the forenoon and afternoon tours.

At the colorful Annual Dinner, which followed the Annual Reception, the Right Honorable Lord Hailsham, P.C., Q.C., Senior Member of the British Cabinet, Lord President of the Council and Chairman of the Conservative Party of Great Britain, delivered an intensely moving address on our relationship to the competing ideologies and the future of Western Civilization. Special honors were awarded to the speaker of the evening, and to three distinguished American lawyers.

Lord Hailsham was inducted as an Honorary Fellow of the American Bar Foundation, his citation reading as

The installation of new officers of The Fellows: (left to right) Charles S. Rhyne, Vice Chairman; David F. Maxwell, Chairman; E. Smythe Gambrell, Retiring Chairman; William T. Gossett, Secretary.

Lord Hailsham

follows:

> Scholar, author, lawyer, statesman, humanitarian,—a fusion of the best in Britain and America,—his great talents through Divine Providence have been brought to the defense of civilization at a time of crisis. Outspoken in his conviction that true nobility is not hereditary but attaches to the individual on considerations of personal character and service to humanity, he stands upon his own record, a veritable prince among men.

H. Rowan Gaither, Jr., of California, New York and Pennsylvania, Chairman of the Board of Trustees of The Ford Foundation, and the featured speaker at the Sunday luncheon of The Fellows, also was inducted as an Honorary Fellow, his citation reading as follows:

> Lawyer, banker, public servant, seeker after truth for the advancement of mankind, he exemplifies American citizenship at its best. Able, dedicated and indefatigable, he serves as the directing genius in the fruitful stewardship of the world's greatest eleemosynary purse.

Albert James Harno, of Illinois and California, was honored for his outstanding research in law and government, his citation reading as follows:

> The Fellows of the American Bar Foundation take pride in presenting this certificate to Albert James Harno in recognition of his noteworthy research in law and government. Holder of degrees from numerous institutions of higher learning; active in the practice of law in California 1914-1917; conspicuously successful as a law professor and law school administrator for more than forty years,—thirty-five years as the illustrious Dean of the College of Law, University of Illinois; joint author of report: *The Workings of the Indeterminate Sentence and the Parole System in Illinois*, 1958; author: *The Supreme Court in Felony Cases*, in Illinois Crime Survey; publisher of *Cases and Other Materials on Criminal Law and Procedure*, 4th Ed., 1957, and *Legal Education in the United States*, 1953; President, Association of American Law Schools, 1932; National President Order of the Coif, 1934-37; Fellow, American Academy of Arts and Sciences; member, American Bar Association; Chairman of its Section of Legal Education; member of its House of Delegates; member of its Board of Governors, 1950-53; Fellow, American Bar Foundation; member of American Bar Foundation's Committee on the Administration of Criminal Justice, and former Chairman and now member of its Research Committee; member, American Law Institute, and member of its Council, 1947-; President, Illinois State Bar Association, 1940-41; member of the Council of the Survey of Legal Profession; Commissioner on Uniform State Laws from Illinois, 1934-; President, National Conference of Commissioners on Uniform State Laws, 1947-49; President, American Judicature Society, 1953-56; member, Hoover Commission Task Force, 1954-56; Visiting Professor of Law and Acting Dean, University of California School of Law, Los Angeles, 1957-58; a brilliant and dedicated scholar and teacher, now approaching 70, he is still young of heart, rich in experience and accomplishments, and secure in the unbounded gratitude, love and affection of the lawyers, judges and law teachers of America.

Jubal Early Craig, of Arizona, was honored for his having adhered to the highest principles and traditions of the legal profession and for his service to his community, as a lawyer in practice for more than fifty years, his citation reading as follows:

> The Fellows of the American Bar Foundation take pride in presenting this certificate to Jubal Early Craig in recognition of his character and accomplishments as a lawyer, his adherence to the highest principles and traditions of the legal profession and his service

H. Rowan Gaither, Jr.

Albert J. Harno

Jubal Early Craig

to the communities in which he has lived since his admission to the Bars of Virginia and California in 1895 and the Bar of Arizona in 1919. At all times active in local and state bar organization work, he was one of the Founders, and for several years was the President, of the Maricopa County (Arizona) Legal Aid Society. For thirty years he has been a leader in the affairs of the American Bar Association, attending all its meetings. He was a member of its General Council in 1935, was instrumental in its reorganization as a representative body in 1936, and was (1936-1945) Arizona's State Delegate, a position now occupied with distinction by his son. In his 84th year, he remains robust of mind and body, vigorously serving his clients and brightening the lives of his countless friends throughout the nation with whom he still delights to foregather.

The dinner program included familiar Negro spirituals sung by the Big Bethel A.M.E. Church Choir.

At the official breakfast on Sunday morning, Chairman Gambrell presented the other officers of The Fellows and the officers of The Foundation, and the following reports were made:

"Survey of the Administration of Criminal Justice", by Walter P. Armstrong, Jr.; "Annotation of the Model Business Corporation and Non-Profit Corporation Acts", by George C. Seward; "Other Research Projects and Activities, Those Under Way and Under Consideration", by Albert J. Harno; and "The William Nelson Cromwell Library and Library Activities", by John C. Leary.

President Rhyne then entered into a general discussion of The Foundation and its program, after which comments and suggestions from the floor were invited. The following were elected officers of The Fellows for the ensuing year: David F. Maxwell, of Philadelphia, Chairman; Charles S. Rhyne, of Washington, D. C., Vice Chairman; and William T. Gossett, of Dearborn, Michigan, Secretary.

At the final luncheon of the second Annual Meeting, Mr. Gaither, who was Chairman of the Committee which authored the recent "Gaither Report" on national security, delivered a thoughtful and stimulating address on "Law, National Security and Survival".

In every respect the meeting was a heartwarming and constructive gathering in which the Fellows and their ladies broadened and deepened their friendships, strengthened the bonds of common interests and affection and rededicated themselves to the fine endeavors of The Foundation.

Producing Great Lawyers . . .

(Continued from page 329)

curriculum, entirely overlooking the study of the values to be sought by means of law which alone give vitality and meaning to the study of law and to its practice. In the summer of 1957, American lawyers in England made a pilgrimage to Runnymede to dedicate a monument in commemoration of Magna Carta. Here was won a great victory in the history of human liberties. On the central pedestal of the monument appears the legend, "Freedom under Law." But just what is there in the nature of man that makes the liberties of Magna Carta of such transcendent importance? It is because they are vitally essential in creating a favorable climate and so help man forward on his long, rough road to his ultimate destiny.

It may be admitted that the law schools cannot undertake to train philosophers. But they can require, instead of merely suggest, a proper amount of pre-legal study in ethical values. They can then provide in law school for recognition of the primary and intermediate aims of the law and show wherein legal philosophy differs from that of other disciplines. The law schools can then point out to the student that the final aim and purpose of the law is the same as that of other studies involving value-theory and that the law intends the well-being of man, whatever that may be considered to be. The various answers that men have propounded as to the ultimate human good should finally be restudied. Then the student must be left free to adopt his own *Weltanschauung*, his world-view.

The human leadership that is expected from lawyers, that is needed from lawyers, requires on their part an understanding and appreciation of the vision splendid that is incarnate in the profession of law. The lawyer must see his career as related to the deepest tides of destiny, to the largest endeavors of the mind and spirit of man. Then only can he be a great lawyer.

When will the law schools do their rightful work? One recalls David Hume's dream of meeting Charon at the River Styx. Hume pleaded for a little more of life in order to see what he had fought for come to pass. But Charon lost his temper and burst out in a rage, "You incurable dreamer, that will not happen in a thousand years. Do you think I will grant you as much life as that? Get into the boat this instant, you loitering foolish optimist of a rogue."

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observed, once the interests to be served are listed and illustrated. Pound and his school seem ready to adjourn. They have devised no guide to tell when one interest must be subordinated to another. In short, they stand halted at the threshold of the theory of values which, in this area, is legal philosophy. *Cf.* Pound, INTRODUCTION TO THE PHILOSOPHY OF LAW (1922) 99, SOCIAL CONTROL THROUGH LAW (1942) 103-134.

The Refugee Problem:

An International Legal Tangle

by John S. Bradway and Alona E. Evans

The rise of modern dictatorships in Germany and Russia produced an acute problem as thousands of men and women sought to flee from the oppression of Hitler and the tyrants in the Kremlin. The problem of displaced persons has been with us now since World War II and the problem is far from being solved. Mr. Bradway and Miss Evans propose the creation of a new international agency under the United Nations to handle this dilemma.

A significant feature of the modern international scene is the continued existence of "refugeeism". World War II and post-war political crises in Europe, the Middle East and the Far East have created millions of refugees. Although marked success has been achieved by public and private agencies during the past decade in terminating or ameliorating the condition of thousands of refugees, especially in Western Europe, such a political crisis as the revolt in Hungary in the fall of 1956 not only creates many more thousands of refugees but also sharply focuses attention on the variety of problems inherent in refugeeism.

Responsibility for handling the problems of refugees devolves upon many public and private organizations. International agencies currently dealing with refugees include the Office of the United Nations High Commissioner for Refugees, which maintains more than a dozen branch offices or representatives in Europe, the Americas and Asia, and which has supervisory and co-ordinating responsibility for the bulk of refugees, as well as the Intergovernmental Committee for European Migrations composed of representatives of twenty-six states, which has responsibility for the transportation of refugees to areas of resettlement. Within various countries governmental and voluntary agencies arrange for the admission and resettlement of refugees. In the United States, for example, the admission and resettlement of refugees under the terms of the Refugee Relief Act of 1953 are handled by thirty-one voluntary agencies representing religious, ethnic and service organizations, including the Church World Service, the International Rescue Committee, the Catholic Committee for Refugees and the International Social Service. The agencies work with public groups such as the Governors' Committees for the Refugee Relief Program, established in forty states, and with departments of the Federal Government.[1]

Refugees' Legal Problems . . . Public and Private Matters

The legal problems of refugees involve matters of both public and private interest. Because a refugee by his very condition is deprived of the diplomatic protection of his own state, international protection of his interests must be assumed by the United Nations High Commissioner for Refugees.[2] "Identification" of the refugee, i.e., establishing such data as national origin, age, personal status, civil status, both for control purposes in the state in which the refugee first takes asylum and for the acquisition of necessary travel documents to enable the individual to move to and be resettled in another country, is a major problem handled by this office.[3] Other legal problems emerge after the resettlement of the individual. For example, in some countries there must be a modification of stringent laws regarding the employment of aliens; in others arrangements must be made for the validation of professional certificates so that refugees may exercise their professions.[4] The provision of public assistance to unemployed, ill, handicapped or aged persons and to children represents another area in which legal difficulties may arise. Housing, especially difficult for refugees where acute shortages exist and government-sponsored projects

1. United States House of Representatives, Committee on Judiciary, *Fifth Semiannual Report of the Administrator of the Refugee Relief Act of 1953 as Amended, March 6, 1956*, 22-24, 15-19.

2. Paul Weis, Legal Adviser, Office of the United Nations High Commissioner for Refugees, letter of October 10, 1956.

3. *Report* of the United Nations High Commissioner for Refugees, 1955 (General Assembly, Official Records: Tenth Session, Supplement No. 11 (A/2902 and Add. 1), 5, 9. (cited as *Report* U.N.H.C.R.)

4. *Ibid.*, 7, 1.

are the principal source of new dwellings, introduces policy questions in countries of resettlement or integration.[5] For certain refugees, legal assistance is necessary in the determination of losses through Nazi persecution and in the distribution of compensation to surviving victims or heirs.[6]

The personal affairs of the refugee are bound to be affected adversely by reason of his movement from his former homeland to an asylum state and thence to some permanent location. Numerous difficulties can arise in the matter of inheritance, for example, involving as it does proof of the death of persons, validation of wills, determination of heirs, disposition of real property, transfer of assets, which latter is often complicated by currency restrictions and by the existence of wartime legislation blocking the transfer of "enemy assets".[7] Safeguarding the interests of refugee orphans, involving arrangements for custody, guardianship and adoption, as well as questions of nationality, introduces another area in which legal assistance may be needed by the refugee.[8] If to these problems are added those of family maintenance, divorce, not to speak of claims—workman's compensation and insurance—it can be seen that refugees present many more problems than acquisition of travel documents and resettlement in a new country.

Provision of Legal Aid for Refugees

Given the complexity of the legal problems of refugees and bearing in mind the related difficulties arising from the refugee's probably limited financial resources, language barriers and lack of familiarity with the nature of legal protection available to him in the state of asylum or of resettlement, it becomes a matter of some concern as to how the individual is to be advised and assisted in the solution of his legal problems. The Office of the United Nations High Commissioner for Refugees provides legal protection for refugees in regard to a variety of "general" problems.[9] Legal assistance, including legal advice and representation in administrative and court proceedings is not provided by this office, such requests being referred to appropriate public or voluntary agencies.[10] Some sixteen states are bound by the 1951 Convention Relating to the Status of Refugees which gives refugees in the contracting states access to courts, legal assistance, as well as exemption from *cautio judicatum solvi* on the same basis as nationals of these states.[11] Such "national treatment" clauses in the Convention provide the refugee with means for the general protection of his legal rights reminiscent of similar clauses for the protection of aliens which are to be found in many commercial treaties. The Convention does not envisage, however, any special machinery for legal assistance to refugees, assuring them only of access to that available in member states. In certain countries facilities for the provision of legal aid are quite well developed. In the United States, the services of some 150 legal aid bureaus and sixty lawyers' associations are available to refugees.[12] Representatives of voluntary agencies and of national and provincial authorities in West Germany and Austria, where there is an acute awareness of the problems of refugees, have undertaken to plan procedures for legal assistance to refugees and for publications on the legal position of refugees.[13] In many other countries in Western Europe and Latin America, legal aid is available to refugees through public or, more often, private agencies. In the Middle East relatively little has been done to provide legal aid services in general or for refugees.[14]

It may be asked whether refugees make a demand for legal assistance and whether present facilities meet that demand. A survey of thirty-one voluntary agencies in the United States which work with refugees indicates that there is such a demand although few of these agencies are prepared to furnish statistical data on the matter.[15] It is also evident that these agencies do not, in general, provide legal advice themselves, preferring to refer such matters to established legal aid services; or where legal assistance is rendered, it is mainly in regard to immigration status and the representation of refugees in administrative proceedings. Apart from referrals by these agencies, the use of established legal aid facilities by refugees is probably limited by lack of information, language barriers and timidity. The provision of such services in this context has something of an *ad hoc* character.

A Suggested Remedy . . . An International Agency

It has been suggested elsewhere and the suggestion is reiterated in the light of the continued existence of a refugee problem that the formal provision of legal aid services on an international level is long overdue.[16] The work of voluntary agencies dealing with refugees and of legal aid organizations has been of vital service in meeting this need, but, of necessity, it has been a stopgap. This situation has been recognized by both groups, at the Conference of Non-Governmental Organizations Interested in Migration in New York in 1955 and at the meeting of the International Bar Association in Oslo in 1956. The former group is actively interested in establishing an international clearing house for information regarding legal aid services and for liaison purposes.[17] It is submitted that a definite program of legal aid should be established under the auspices of a specialized international agency. The possible nature and function of such an agency will be sketched briefly.

Because of its novel and experimental character, it would be desir-

5. *Ibid.*, 7. *Report* U.N.H.C.R., 1953 (General Assembly, Official Records, *Eighth Session, Supplement No. 11* (A/2394), 4.
6. *Report* U.N.H.C.R., 1955, 9.
7. *Ibid.*
8. *Report* U.N.H.C.R., 1953, 14.
9. During the period, June-September, 1956, the Headquarters of this Office received 154 requests for "assistance of a legal nature" with respect to such matters as compensation for Nazi damages, tracing relatives, family reunion including exit visas, and expulsion. Letter of October 19, 1956, from Paul Weis, Legal Adviser to the Office.
10. *Ibid.*
11. Article 16. United Nations, YEARBOOK ON HUMAN RIGHTS FOR 1951, 583.
12. *Report* of Geneva Working Party to Fifth International Conference of Non-Governmental Organizations Interested in Migration, 1955, 3. (cited as *Report* N.G.O.)
13. *Report*, U.N.H.C.R., 1955, 8.
14. *Report*, N.G.O., 14-17.
15. The Tolstoy Foundation reports that 297 persons applied for legal advice in 1955 at the weekly legal aid clinic operated by that agency for Russian displaced persons. Their problems mainly concerned "immigration, real estate deals, divorces and accident cases". Letter of October 15, 1956, from Elizabeth Tomashewsky, Immigration Director.
16. Bradway, J.S. and A.E. Evans, *International Aspects of Legal Aid*, 38 AM. J. INTL. 462 (July, 1944); *Project of a Convention for an International Legal Aid Organization*, 4 JOUR. L. AND POL. SOC. 185 (1946-1947).
17. Letters of February 19 and June 19, 1957, from Henri Coursier, Legal Department, International Committee of the Red Cross; *Report*, N.G.A., Sixth Conference, August, 1957.

able that such an international legal aid office be a "specialized agency" within the meaning of the United Nations Charter. It would be closely associated with the Office of the High Commissioner for Refugees and with public and private agencies dealing with the same clientele, and would have the objective of co-ordinating present services and establishing new facilities for legal assistance. Several problems would have to be considered in establishing such an organization.

1. *Location*

It would seem desirable that there be a centrally located headquarters for the agency and a number of strategically placed branch offices. The headquarters should be near the United Nations Headquarters in New York in order to facilitate the exchange of non-legal information regarding problems of refugees as well as to advance inter-agency co-operation regarding legal assistance. It should be noted that Geneva would be an appropriate alternative. The local offices, however, should be established wherever the volume of refugees is sufficiently large to warrant this service. As the volume of refugees entering a given area would be subject to fluctuation, branch offices would be opened or closed as local need would dictate.

The relation between the branch offices and agency headquarters could follow one of two possible patterns. The simpler form would make extensive use of existing local facilities, local legal aid societies if existent, local lawyers or voluntary groups interested in the problem.[18] This arrangement would have the advantage of low operating expenses. It would function when the need arose. Its relation to the headquarters would be relatively informal, mainly involving referral and reporting.

In areas in which the volume of refugee applications for legal assistance was large and the problems marked by complexity and delicacy, a more formal pattern of organization would be essential.[19] The international legal aid office would establish branch offices near the branch offices of the Office of United Nations High Commissioner for Refugees, thereby facilitating the co-ordination of the work of these complementary agencies. In the more formal arrangement, considerable direction and control would be exerted over the work of local offices by the headquarters. Staffing and operations would involve more expense than the informal plan but efficiency in handling the problems of the clientele and the accumulation of extensive experience in this new field of endeavor would justify emphasis on this approach to organization, leaving the informal arrangement to areas in which the volume of business was limited.

It will be noted that it has been initially assumed that the new agency would probably be a public one, established under the auspices of the United Nations, or perhaps, by interested governments, for example, the states party to the 1951 Convention Relating to the Status of Refugees. A public agency would have the advantage of prestige and, if associated with the United Nations, the advantage of the facilities of that organization.[20] An agency established under private auspices, for example, by the International Bar Association, would have the advantage of flexibility in operation, in the acquisition of contacts, experience and skills during the early experimental years of the organization. It might also face the disadvantage of difficulty in winning the confidence of governments in its work and securing the co-operation of voluntary groups and hence in being of immediate service to its potential clientele.

Location is an important consideration in regard to the type of service to be rendered. The proposed agency must be able to supply the refugee with legal assistance in the state of asylum and in the state in which the refugee is finally settled. In the state of asylum the refugee should not only be "identified" for purposes of acquiring travel documents or for integration into the state of asylum, but there should be an inquiry into his "legal status", a

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18. Legal aid in some states of the United States is organized on the basis of wide geographical coverage. *Cf.* the program of the Legal Aid Committee of the North Carolina Bar Association as presented in its *Annual Reports* for 1955 and 1956. The establishment of organized legal aid service on an international level using a very informal approach would require much skill, tact and imagination.

19. The experience in some metropolitan areas would be instructive, for example, the operations of the New York Legal Aid Society. See Tweed, THE LEGAL AID SOCIETY, NEW YORK CITY, 1870-1951 (1954).

20. For analogous experience in Connecticut with organization for legal aid under public auspices, see Hewes, *The Connecticut Plan for Legal Aid*, 124 THE ANNALS (1926), 152. *Cf.* the English plan under the Legal Aid and Advice Act of 1949. *First Report of the Law Society* (1951); Smith, *The English Legal Assistance Plan*, THE LAW SOCIETY'S GAZETTE (November, 1949).

comprehensive, exhaustive and imaginative inquiry which might do much to reveal what legal problems he may be faced with in the present or future and what his legal rights may be with respect to these problems. In the country of resettlement, the proposed agency would be faced with two tasks in regard to the refugee: it would be necessary to follow up the legal problems previously anticipated, and it would be necessary to provide legal assistance in connection with new problems arising in the course of the refugee's adjustment to his new country. One might think of the two types of service as supplying roughly what would be called in the field of medicine "diagnosis" and "treatment".

Another aspect of location is the necessity for the agency and its branches to be informed about the mass of professional customs, practices and standards which are accepted and acted upon by the local legal profession. These customs not only vary markedly as between the two major international legal systems but also vary appreciably within these legal systems. For example a branch office just opened and anxious to contact every refugee in need of help might violate local professional rules against solicitation of legal employment and stirring up of litigation, not to speak of rules against the unauthorized practice of the law.[21] It follows then, that the proposed agency's plan of operation will have to be established with great care. The International Bar Association could make an important contribution to the professional standards and policies of the agency.

2. *Clientele.*

The group of persons for whom international legal assistance is to be made available must be considered. It is not enough to use the general term "refugee" in planning the work of the agency. The clientele must be treated in regard to economic, legal and social status.

Refugees may be divided into at least three groups economically. There are those who can pay a full fee, those who can pay only a small or nominal fee and those who are unable to pay any fee. If a member of the first group calls upon the agency for assistance, local lawyers may well feel some reservations about the program. They may argue that an international humanitarian program should not function in competition with them. If the refugee applicant can pay only a nominal fee, this objection will be much less. There is not likely to be any adverse reaction to the provision of assistance to the indigent. Therefore, it follows that the work of the agency should be limited, at the beginning at least, to assistance to clients who cannot pay a fee. If, at a later time it appears desirable to widen the coverage to those who can pay a nominal fee, this step can be taken. One exception might be feasible, however, as the agency would have unusual facilities or international "channels" at its disposal for acquiring information, documents, *etc.*, which might be necessary to the well-being of a refugee, it might make such facilities available to local lawyers and their clients as well as to the indigent.[22]

In regard to legal status, refugees may be divided into many groups, each characterized by the type of problem presented for solution. Existing legal aid organizations in the United States find that if they accept certain types of cases, they may be subjected to professional or lay criticism. Among these are divorce cases, the criticism running along the line that a divorce is a luxury and the client should pay for it. A similar attitude is taken toward adoption cases.[23] No doubt the proposed headquarters agency would have to establish policies on such matters, while aiming for as legally comprehensive a service as local conditions would permit.

Finally, the refugee group may be divided according to social status. It is to be hoped that local conditions would not interpose objections to a socially inclusive program, for restrictions dependent upon race, class, color, creed, education would seem out of place in this agency's function.

Where the work of the proposed agency might be restricted in the beginning to a given group, the expectation would be that it would become more inclusive in the course of time. Two examples from the experience of organized legal aid work in the United States illustrate the point. The initial agency in New York City was established to serve German immigrants who were being exploited upon their arrival in what was to them a strange country.[24] In Chicago legal aid was originally established to serve women and girls.[25] In both cases the service was soon expanded to all poor people. Similarly, the work of the proposed agency should expand from service to refugees to service to all who have need of it.

3. *Staff*

Staff for the projected agency would depend in size upon the volume of applications; staff members would be distributed between the headquarters and the branch and local offices in asylum states and states of resettlement. The headquarters staff would be concerned with general administration of services, with policy-making and research. The nature of the first category is obvious; a word may be added about the other two. Policy would include the establishment and maintenance of standards of service as well as the selection and development of the specialized personnel required for the conduct of these services. The interest in comparative law which is emerging in law schools in the United States, for example, might receive further impetus through the work of the proposed agency.

Legal Research . . . Significant Activities

Research would be one of the most significant activities of the agency. To take a simple example, a refugee might consult a local lawyer in State *A*. The lawyer in his efforts to solve the problem finds that he must have accurate

21. See, for example, Canons 27 and 28 of the Canons of Professional Ethics of the American Bar Association. Note also, the draft code of international ethics submitted for consideration by the Fifth Conference of the International Bar Association at Monte Carlo in 1954. *Report*, 134.

22. In recent years a committee of the American Bar Association has been studying the problem of "the lawyer's reference plan". See the following brochures: Porter, LAWYER REFERENCE PLANS (1949); Smith, LEGAL SERVICE BUREAUS FOR PERSONS OF MODERATE MEANS (1950).

23. Brownell, LEGAL AID IN THE UNITED STATES, 71 *ff*, (1951).

24. See Maguire, THE LANCE OF JUSTICE (1928).

25. See Garlepy, *The Legal Aid Bureau of the United Charities of Chicago*, 124 THE ANNALS 33 (1926).

and inclusive information about the law of State *B*. In ordinary circumstances he would employ a foreign correspondent versed in the law of *B*, depending upon official, commercial or professional lists for the name of such a correspondent. If the case in question involves a need for information about the laws of States *C*, *D*, and *E*, the difficulties of the practitioner are greatly multiplied. The proposed agency in such a situation would be in a position to do two things: to provide the necessary legal information for the local lawyer or to suggest competent persons in foreign states who could supply the needed information. The former procedure would be appropriate in cases involving indigent clients; the latter would be appropriate where clients could pay a fee.

One can speculate upon the increasing value of the collection in the headquarters office of a continuous flow of briefs of law on various subjects. The collection would in the course of time attract not only the interest of lawyers but also of scholars and government officials.

While we are considering the matter of research, it should be borne in mind that research in facts would be equally important in regard to refugee cases. This research would be the responsibility of branch or local offices acting under the supervision and direction of the headquarters staff. The branch or local offices would be put in the position of acquiring that information for which the local lawyer assumes responsibility in a local case, *e.g.*, interviewing witnesses, visiting the scene of an accident or of a crime and so forming his own first-hand opinion of the nature of the issue presented to him by his client. On the international level acquisition of such information would be difficult and, for the local lawyer in an international case, "second-hand". It would be further complicated by "translation" not only in terms of language but also in terms of differences in legal frames of reference. The headquarters office presented with a problem involving, for example, Islamic law, Hindu family law, or the Roman-Dutch law of South Africa, would be in a position to answer general inquiries or to undertake specific research. The branch office in Iraq, India or South Africa would be in a position to acquire factual data pertaining to a specific case involving matters arising in one of these countries. Such activities of the agency and its branches suggest an impressive prospect of a living body of comparative law kept constantly up to date in terms of actual cases which arise and which are solved by reference to it.

4. *Operation*

The above discussion gives a fair idea of some considerations involved in the establishment of the agency. A few words may be added regarding its operation after establishment. Two phases of operation may be distinguished. In the first phase, the matter of clearance of the refugee for resettlement in another country than the state of asylum could be handled by the Office of the United Nations High Commissioner for Refugees. At the same time a representative of the legal aid agency would anticipate through interviews with the refugee any prospective legal difficulties which might arise in regard to resettlement. The state of resettlement might have stringent laws with respect to the validation of professional certificates of aliens or, if the refugee were a minor, questions regarding guardianship would have to be settled. In the second phase, following resettlement of the refugee, the agency would be prepared to handle other types of cases. The refugee might learn of the death of a relative in his former homeland or elsewhere and seek to ascertain whether he is the sole heir or one of several heirs. Or again, the ex-refugee may be owner of certain industrial property rights but may be barred from the enjoyment of it because a certain state has sequestrated them as "enemy assets". Or yet again, the ex-refugee may have married under provisions of Malabar family law and now seeks to alter his marital status in the country of resettlement. Faced with such problems which are complicated by a previous condition of refugeeism, the ex-refugee would turn to the branch office of the proposed agency for legal advice. In turn, the headquarters research staff and other branches would provide the information necessary to the clarification of the individual's case.

Conclusion

There is a demonstrated need for an agency of international character which can supply legal assistance to the refugee and to the ordinary citizen faced with a legal problem involving international considerations. From a humanitarian point of view, the condition of the former client makes the establishment of such an agency desirable while from the professional point of view of providing adequate legal service to the latter client the establishment of such an agency is persuasive. An international legal aid office should be appealing to those who demand a realistic solution to community problems. The agency would be inexpensive as contrasted with the budgets required for service which affords material relief. The legal profession would find value in the proposed agency through its contribution to legal service and to the development of expertise in comparative law.

In the last analysis the value of the agency to the clientele, primarily the refugees, is of the greatest importance. Those who have grievances should be relieved to find a service available specifically for the purpose of solving their legal problems. But the most fundamental consideration is found in the very idea of such an agency as a step toward the advancement of the concept of international community built upon the belief in rule of law. The idea of rule of law comprehends equal protection of the law.

Proceedings of House of Delegates:

Midyear Meeting, Atlanta, February 24-25

The 1958 Midyear Meeting of the House of Delegates was the largest in the history of the Association and was preceded by the most successful Atlanta Regional Meeting, February 18-22. The House met in four sessions, a detailed account of which is published here in accordance with our custom. The account contains the full text of all resolutions adopted by the House, as well as a summary of the debates.

James L. Shepherd, Jr.

First Session

The House of Delegates of the American Bar Association held its Midyear Meeting in the Atlanta Biltmore Hotel, Atlanta, Georgia, on February 24 and 25. The first session of the House was called to order by the Chairman of the House, James L. Shepherd, Jr., of Houston, Texas, at 10:05 A.M. on the morning of February 24.

After the roll call, the State Delegate from Colorado, Edward G. Knowles, of Denver, presented a new gavel to the Association. Mr. Knowles explained that the Colorado Bar Association had furnished the gold and silver bands attached to the Association's original gavel on which are engraved the names of all Presidents of the Association. This year, since there was no room left on the original gavel for President Rhyne's name, the Colorado Bar Association was contributing a new one so that the tradition could be continued, he said.

Committee on Credentials and Admissions

Glenn M. Coulter, of Detroit, Michigan, Chairman of the Committee on Credentials and Admissions, reported for that Committee. Mr. Coulter moved that the Dade County Bar Association (Florida), the Houston Bar Association (Texas) and the Federal Power Bar Association be entitled to delegate representatives in the House.

Martin J. Dinkelspiel, of San Francisco, California, speaking for the Committee on Scope and Correlation of Work, urged that the House defer taking action as to the Federal Power Bar Association until the Los Angeles meeting in August. He explained that his Committee and the Committee on Rules and Calendar had under consideration several changes in the Association's Constitution and By-laws dealing with the size of the House of Delegates and the general problem of limitation and control of the House. The two Committees will present amendments of the Constitution and By-laws on this problem at Los Angeles, he said.

Mr. Coulter replied that the Credentials and Admissions Committee had been considering the Federal Power Bar Association for two years, and that, while he agreed with most of what the Committees on Scope and Correlation and Rules and Calendar were doing to keep the membership of House down to workable size, he thought that an exception should be made in this case.

There was some further discussion of the issue between Mr. Dinkelspiel, Mr. Coulter, and Albert E. Jenner, Jr., of Chicago, Illinois, and Mr. Coulter finally deferred to Mr. Dinkelspiel and accepted the postponement in order to save the time of the House.

The balance of Mr. Coulter's motion, dealing with the Dade County and Houston Bar Associations, was carried.

Mr. Coulter then presented the following new members of the House: Neva B. Talley, of Little Rock, Arkansas; William C. Farrer and Sharp Whitmore, both of Los Angeles, California; David G. Bress, James P. Burns, Earl W. Kintner, Warren Olney

III, George S. Smith, and Lawrence E. Walsh, all of Washington, D. C.; H. Baird Kidwell, of Hawaii; Clay V. Spear, of Cour d'Alene, Idaho; William H. Avery, Jr., and Jerome S. Weiss, of Chicago, Illinois; Timothy W. Swain, of Peoria, Illinois; David A. Nichols, of Camden, Maine; G. C. A. Anderson and Francis A. Michel, both of Baltimore, Maryland; Erwin N. Griswold, of Cambridge, Massachusetts; Henry L. Woolfenden, of Detroit, Michigan; John M. Dalton, of Jefferson City, Missouri; Kendrick Smith, of Butte, Montana; J. Leonard Sweeney, of Nashua, New Hampshire; Robert M. Benjamin and Churchill Rodgers, both of New York, New York; Robert H. Jamison, of Cleveland, Ohio; Garrett Logan, of Tulsa, Oklahoma; James C. Dezendorf, of Portland, Oregon; Walter E. Allessandroni, of Philadelphia, Pennsylvania; Joseph D. Calhoun, of Media, Pennsylvania; J. Villard Frampton, of Pennsylvania; Frank E. Foote, of Pittsburgh, Pennsylvania; John D. Carbine, of Rutland, Vermont.

The House then approved the advance calendar as the order of the day.

President's Report

Charles S. Rhyne, of Washington, D. C., President of the Association, devoted the main portion of his report to plans for Law Day—U.S.A., which is to be observed May 1. He urged the members of the House of Delegates to give all possible support to the observance of the occasion and called for help from state and local bar associations. (An address on Law Day—U.S.A., delivered by Mr. Rhyne at the opening session of the Atlanta Regional Meeting, appears elsewhere in this issue. See page 313.)

Budget Committee

The report of the Budget Committee was given by Chairman Vincent P. McDevitt, of Philadelphia, Pennsylvania. Mr. McDevitt's report also included the Treasurer's Report, in the absence of Harold H. Bredell, of Indianapolis, Indiana, because of illness.

Committee on American Citizenship

Cecil E. Burney, of Corpus Christi, Texas, reporting briefly for the Committee on American Citizenship, announced that the Freedoms Foundation, Inc., had designated the Florida Bar's lecture series on Communism designed for high school students, as the most outstanding program of its kind in the United States and had awarded the Florida Bar $1,000 and the Thomas Jefferson Gold Medal.

Board of Governors

The House then turned to one of the most interesting and important problems to come before the meeting—the question of revising Canon 35 of the Canons of Judicial Ethics, which forbids the taking of photographs in or broadcasting or televising from courtrooms. There has been considerable discussion of the Canon in newspapers and magazines and elsewhere, and representatives of the press have been calling for its revision or repeal. In 1954, the Board of Governors authorized the appointment of the Bar-Media Conference Committee on Fair Trial and Free Press to meet with representatives of national associations of certain of the media, and, about a year later, a Special Committee of the American Bar Foundation began a re-examination of all of the Canons of professional and judicial ethics. This Committee has now reported to the Board of Governors, proposing a restatement of Canon 35. It was this proposed restatement of the Canon that was brought before the House of Delegates at the Atlanta meeting.

The discussion was begun by Mr. Coulter, of Michigan, speaking for the Board of Governors. He outlined the history of Canon 35 and then, speaking for the Board, moved adoption of the restated Canon drawn up by the Foundation Committee.

Richard P. Tinkham, of Hammond, Indiana, a member of the Bar-Media Conference Committee, reported for that Committee. The Committee is made up of representatives of the Committee on Public Relations, the Section of Judicial Administration, and the Committee on Professional Ethics and Grievances. Mr. Tinkham said that after several conferences with the media representatives, the two sides had been unable to agree. "We found . . . that we were losing the Canon 35 battle piece by piece under the attack of the media", he said. ". . . Judge after judge was being persuaded the Canon violated the rights of the media under the First Amendment. . . . We were not convinced to their way of thinking, however, although we did concede some of their arguments, one of them being that the modern equipment for photographing and televising and broadcasting was unobtrusive and could be utilized so as not to be able to be observed in the courtroom.

"However," Mr. Tinkham continued, "there were three things that bothered us. Number one, we believed that courtroom photographing or broadcasting or both would impose undue police duties upon the trial judge. Number two, we believed that the broadcasting and the photographing in the courtroom might have an adverse psychological effect upon trial participants—judges, lawyers, witnesses and juries. Number three, we believed that partial broadcasts of trials, particularly on television, might influence public opinion which in turn might influence trial results, and we adhered to that position during our meeting with the media."

Mr. Tinkham reported that his Committee believed that an impartial agency, such as a foundation, should investigate these three basic questions. It was this Committee's recommendation that the House afford an adequate hearing to representatives of the media before acting upon the report of the Board of Governors.

Sylvester C. Smith, Jr., of New Jersey, Chairman of the Committee on Rules and Calendar, then moved that the question be deferred until 2:00 o'clock that afternoon, and that the House resolve itself into a Committee of the Whole at that time to conduct a hearing upon the restated Canon, allowing representatives of the media equal time to present their position to that granted to the proponents of the revised Canon.

Mr. Coulter said that the Board of

Governors were unanimously in favor of this procedure. Mr. Smith's motion was put to a vote and was carried.

Committee on Federal Judiciary

The House then turned to the report of the Committee on Federal Judiciary, presented by Committee Chairman Bernard G. Segal, of Philadelphia, Pennsylvania. Mr. Segal first discussed the "normal work" of his Committee—investigating the qualifications of persons under consideration for appointment to the Federal Bench and reporting thereon to the Attorney General and to the Senate Judiciary Committee after the nominations have been made. He said that Attorney General Rogers had promised to continue to submit to the Committee the names of all prospective nominees for the Federal Bench, and that the President would make no nominations without first receiving the Committee's report. "It is difficult to see how the liaison between our Committee and the Attorney General's office could be better or more satisfactory than it is now", Mr. Segal declared. He termed the relationship with the Senate Judicary Committee "excellent".

He added, however, that the Association's goal on judicial appointments has not been achieved. "Appointees still require political endorsement after they are selected, or before they are selected. And they are still not selected in all cases from among the best qualified for the appointment", Mr. Segal declared.

Ben R. Miller, of Baton Rouge, Louisiana, asked about a recent nomination for appointment to the Federal Bench in South Dakota of a Republican national committeeman.

Mr. Segal said that, after the Committee had filed its report, J. Axel Beck's name had been sent to the Senate for confirmation, although the Committee had advised the Attorney General that in its view Mr. Beck was not qualified. The State Bar of South Dakota had polled the members of its governing body, Mr. Segal said, and they had split five to five on the question of Mr. Beck's qualifications. Mr. Segal said that his Committee had notified the Senate Judiciary Committee that it could not report Mr. Beck as qualified.

Mr. Segal then summarized the status of five bills previously endorsed by the House of Delegates, all sponsored by the Judicial Conference of the United States. Two of the bills had been passed. The three still pending are H.R. 3369, raising the *per diem* allowances of judges; H.R. 3814, requiring Chief Judges of Courts of Appeals and District Courts to step down as Chief Judges at the age of 70; and H.R. 3418, the so-called Omnibus Judgeship Bill, providing for more judges in the federal courts.

Mr. Segal then moved adoption of the following resolution:

> RESOLVED, That the House of Delegates approves in principle the objective of the resolution submitted to the Assembly at the 1957 Annual Meeting by Paul Carrington of Dallas, Texas, and referred by the Assembly to the Standing Committee on Federal Judiciary, that appropriate means be established to assure the participation of a nine-member court in cases to be decided by the Supreme Court of the United States; and
>
> RESOLVED, FURTHER, that the Standing Committee on Jurisprudence and Law Reform consider and report to the House of Delegates on appropriate means for effectuating the foregoing objectives.

He explained that the purpose of the proposal endorsed by the resolution was to eliminate decision of cases by fewer than five members of the Supreme Court by providing for designated Circuit Judges to sit on the Supreme Court when one or more of the nine Justices were absent or disqualified themselves. The question of decision by a minority of the Supreme Court is a very old problem in our government, Mr. Segal said, and he believed that the solution endorsed in the resolution was a good one that could be accomplished by legislation.

The House voted to adopt the resolution.

Mr. Segal then reported on a resolution proposed by Mr. Miller, of Louisiana, and others and referred to the Committee on Federal Judiciary at the 1957 Annual Meeting. Mr. Segal said that the resolution consisted of five whereas clauses and ten paragraphs of resolution, each of the ten paragraphs covering a separate item in the field of federal judicial appointment. The Committee had held extended hearings on the resolution, he declared, and recommended that it be not adopted. The Committee agreed in principle with many of the points, but disagreed with others, some of which are very drastic and would make widespread changes in the procedures for appointing federal judges, Mr. Segal explained.

Mr. Miller moved that action on his resolution be deferred to the Annual Meeting in Los Angeles. The core of the resolution, he declared, was its declaration that nominations for federal judgeships should not originate in the office of the Attorney General or in the Department of Justice, particularly since the United States is now the chief litigant in the federal courts. The resolution calls for nomination of federal judges by an impartial commission. "The reason why deferment is needed and further study given is that the American Bar Association . . . has never addressed itself previously to that point", Mr. Miller said. There were some 33,000 government civil cases pending in the federal courts, he continued, and new ones are being filed at the rate of about 1,500 a month. "That illustrates vividly what all of us must know, if we stop to think about it, and that is that the Department [of Justice] is and is increasingly becoming the chief litigant in the federal courts".

Loyd Wright, of Los Angeles, California, took the floor in support of Mr. Miller's motion to defer. He said that he could not understand why anyone should oppose "the simple request for deferment in order that we can properly appraise the legislation that will be and has been introduced into the Congress, much of which I am sure we will find completely inadequate and brought about by a misunderstanding of the philosophy of the Supreme Court".

Mr. Segal said that he felt that the resolution raised questions that could

not be helpful in the work of the Committee. If there are separable provisions that ought to be considered, he declared, "then I suggest the proper way to do it is to offer them separately and not have them in a hodge-podge which covers the whole gamut, which has many provisions with which no one can agree, and which Mr. Miller advised us at our committee meeting that he would withdraw."

A vote was then taken, and Mr. Miller's motion to defer action carried.

The House then recessed.

Second Session

The House of Delegates reconvened at 2:10 P.M., meeting this time as a Committee of the Whole to allow representatives of the news media to give their side of the Canon 35 controversy. The Chairman of the House, Mr. Shepherd, presided. This was the first time in its twenty-two years that the House had assembled as a Committee of the Whole.

Five speakers addressed the Committee of the Whole,* and there was debate afterward by the members of the House before it reconvened in formal session. Judge Philbrick McCoy, of the Superior Court of Los Angeles, California, Chairman of the American Bar Foundation's Committee on Canons of Ethics, Chief Justice John R. Dethmers, of the Michigan Supreme Court, and Peter H. Holme, Jr., of Denver, Colorado, spoke in favor of the restated Canon 35 prepared by the Foundation Committee; and Elisha Hanson, representing the American Newspaper Publishers Association, the National Press Photographers Association and others, and Robert Swezey, of New Orleans, representing the National Association of Broadcasters, spoke in opposition to the Canon. Each side was allotted forty-five minutes to make its presentation.

Judge McCoy spoke first. He reviewed briefly the history of Canon 35 and then explained the reasoning of his Committee on the problem. He stressed the difficulty of the position of a judge during a trial, urging that he should be as free as possible from every extraneous influence that might tend to distract him. "There's no question about the sincerity and the persuasiveness of those editors, publishers and broadcasters who through the years have opposed Canon 35", Judge McCoy said, "but we cannot disguise the fact that newspapers and broadcasting companies are engaged in highly competitive commercial undertakings . . . we must focus our attention on the impact of this competition on the actual proceedings in the courtroom. There has been no serious suggestion on the part of media that the courts should allow all photographers and recording technicians with all their necessary equipment to carry on their activities during the trial of all cases. If, however, we acceded to the demand for something less than all, someone in authority has to say how much less and in what cases and under what conditions. The . . . media expect the trial judge to assume this responsibility. In our opinion the judge should not be called upon to discharge a nonjudicial function of this nature".

Chief Justice Dethmers expressed concern about the effect of broadcasting and televising upon the constitutional right to a fair trial. The question is, he said, "whether [a fair trial] can be achieved to the highest degree if there are distracting influences not necessary to the proper conduct of a trial, and . . . whether abolishing or relaxing the Canon will tend to introduce such distractions to the trial. . . . A witness is not entitled to privacy when he takes the stand. When he does so, however, the parties, court and jury are entitled to have him function to the best of his ability, without unnecessary distraction. . . . Assuming that modern equipment permits its use in the courtroom in such a manner as to escape detection by those present, if generally permitted would it be long before witnesses became aware of the fact? Would the knowledge that he was the object of a television camera or radio microphone, while on the stand, leave him free to concentrate wholly on the subject matter of his testimony? And what of the judge, particularly when subject to periodic re-election?"

Judge Dethmers also expressed doubt that relaxation of the Canon would contribute to education of the public about the judicial process. "Radio and television must depend upon revenues, and these, in turn, on program interest to the public", he pointed out. "Would the projected programs do much more than present those features of trials having to do only with sensational facts? Would there not, thus, be little more than a partial or one-sided picture of court procedure, leaving the public still uninformed as to the basic judicial role and the importance of the rights of people under the Constitution?"

Mr. Holme said that the question was not whether cameras make noise or whether microphones are unobtrusive, although these are the questions about which most of the debate has raged. He was willing to concede, he said, that it is possible to take pictures with no one knowing it and that it is possible to televise without anyone knowing it. ". . . We can assume that the only way people know about it is that they know it is being done. They don't know when".

Mr. Holme said that he believed that to permit picture-taking and televising would change the behavior of jurors and witnesses. "It will appeal to the politician judge; it will appeal to the ham lawyer . . . it will appeal to the witness who wants to make a big public impression, none of which is essential nor helpful in the real question of what should go on in a courtroom." He also pointed out that many judges are elected. "It is perfectly apparent, I think, that the judge who plays ball with the paper will be the one who will in turn receive favorable publicity when the time [for re-election] comes", he said. "The judge who, as many judges have done in this country, flatly says 'I will not permit it in my courtroom' can hardly expect the same generous treatment from the media."

Mr. Hanson, speaking in opposition to the Canon, declared that all the media firmly adhered to the principle that judicial proceedings should be

(Continued on page 377)

* To avoid confusion with other Committees, the Committee of the Whole will hereafter be referred to as the "House".

AMERICAN BAR ASSOCIATION

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EDITORIAL OFFICES

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Signed Articles
As one object of the *American Bar Association Journal* is to afford a forum for the free expression of members of the Bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of the *Journal* assume no responsibility for the opinions or facts in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

Law Day—U.S.A.

Times were when Law Day—the day when the view of frankpledge took place at the court leet or sheriff's tourn to see that every freeman had taken the oath of allegiance—came twice a year. Perhaps with such frequent repetition of ceremony custom staled the appeal of loyalty. The years of desuetude, though, have served to give a poignant freshness to President Eisenhower's designation of May 1, 1958, as the first Law Day in our history. It should serve to awaken every one of us to a realization that our allegiance has an even more solid foundation than patriotism. Just as our land of our birth commands the allegiance of our hearts, our land of the law commands the allegiance of our minds. How fortunate are we that we were born in a country where no tyrant could do with us as he wished, where no one could "suspend constitutional guaranties" every time the occasion arose when they were most sorely needed! It is most fitting that we should pause and take thought of that precious blessing of liberty that law has made possible for us in America.

Law Day is not merely another Thanksgiving Day, however. We lawyers are more familiar with the term as applied to the day when the law demands the fulfillment of the obligation with only merciful equity left to accept performance thereafter. It is well that the term has this double connotation of a day of patriotism and a day of punctilio. The law will not automatically protect our liberties. The rights of the individual as expressed in the law of the totalitarian countries far exceed those expressed in our law. The difference is that in their case the rights exist only on paper. That could happen here. Without punctilious observance law languishes and dies. The man who complacently treats a governmental administrative agency more like a customer than like a court is likely to find himself, in some other case, invoking rights that just such complacence has made unobtainable. As we quite properly give thanks for law as a blessing we must remember that that blessing is not a free gift. We cannot have it unless we devote ourselves to upholding the law and seeing that it is upheld. We must show our respect for law not only in our words but in our deeds.

Editor to Readers

The following editorial by Robert McKee appeared in *The Atlanta Journal*, February 26, 1958, under the title "Brief Cases and All—Lawyers Lent Atlanta an Air of Distinction":

> Lawyers came here from every part of the nation a few days ago for sessions of the American Bar Assn. Among them were a large number of young fellows—the neophytes whose names are in small type partitioned off by a black line on letterheads.
>
> These young fellows helped themselves considerably by what they saw and heard—and by whom they met. The wise old heads in the profession can do a lot for young lawyers—and certainly there is no better place for making contacts than in meetings like those held here.
>
> The older members of the bar run things in the association gatherings, and that is as it should be, for standing and experience are qualities of prime import in the profession of law.

Gained

> The youthful members learn as they go along, and those with foresight to attend the sessions here felt they had gained a lot. They heard the speeches, they met friends from nearby states, and it was a helpful experience when they could sit and chat with a fellow member who knows the answers, say one like Oscar W. Haussermann, head of one of Boston's old law firms.
>
> Mr. Haussermann, a graduate of Harvard Law School, finds he too gains by attending the meetings. Fraternal kinship among members of the bar is strong. It pays to keep up with who's who and what's what—perhaps more than in most professions.
>
> The lawyers held parties, but not the kind of wild abandon. They never forgot courtroom manners. "Lawyers feel they must conform", explained Malcolm Talbott, who is

on the law faculty at Ohio State University. This summer Mr. Talbott (Virginia-born) will move to the University of North Carolina at Chapel Hill.

Certainly the lawyers at the big meetings in Atlanta did conform. They wore black shoes. (I saw only two pairs of brown shoes.) They like 20-dollar hats and ties of quiet design. Their suits were dark and expensive. Many wore vests with watch chain—a splendid way to display Phi Beta Kappa keys.

You could detect those from the North—scarfs and shaggy overcoats. Gabardine topcoats were badges of those from Florida, Mississippi and Alabama. All had the courtroom habit of rubbing palms against fronts of coats. The trial lawyers spoke a bit louder than the others. The corporation types sometimes had whispering tones.

When they put on evening coats for cocktail parties they were an exceptionally handsome company, especially those veterans of courtroom battles with their quick eyes, expressive hands and greying hair roached back. (Many of them brought their wives to the Atlanta meeting—and a stunning group of ladies they were.)

Sidearms

Their briefcases were their sidearms, and an astonishing number came to Atlanta bag and briefcase. I saw two or three being opened. Each was filled with papers clipped together in legal-minded order.

A delegation came from Little Rock and their colleagues had many questions. The answers were brief and to the point.

There was a group of distinguished looking men from Philadelphia, and Mr. Talbott gave me the origin of the saying: "As smart as a Philadelphia lawyer".

Back in colonial days one John Peter Zenger was arrested on a charge of sedition and New York authorities prevailed upon attorneys there not to take his case. It looked like poor John Peter was in a fix until a Philadelphia lawyer named Aldrich stepped forward and offered to defend him. He did and won an acquittal. Ever since Philadelphia lawyers have worn a nimbus of eminence.

Well-heeled and alert, the lawyers lent Atlanta an air of distinction during their stay here.

The President's Proclamation

The White House
February 3, 1958

A PROCLAMATION
by the President of the United States of America

WHEREAS *it is fitting that the people of this nation should remember with pride and vigilantly guard the great heritage of liberty, justice and equality under law which our forefathers bequeathed to us; and*

WHEREAS *it is our moral and civic obligation as free men and as Americans to preserve and strengthen that great heritage; and*

WHEREAS *the principle of guaranteed fundamental rights of individuals under the law is the heart and sinew of our nation, and distinguishes our governmental system from the type of government that rules by might alone; and*

WHEREAS *our government has served as an inspiration and a beacon light for oppressed peoples of the world seeking freedom, justice and equality for the individual under laws; and*

WHEREAS *universal application of the principle of the rule of law in the settlement of international disputes would greatly enhance the cause of a just and enduring peace; and*

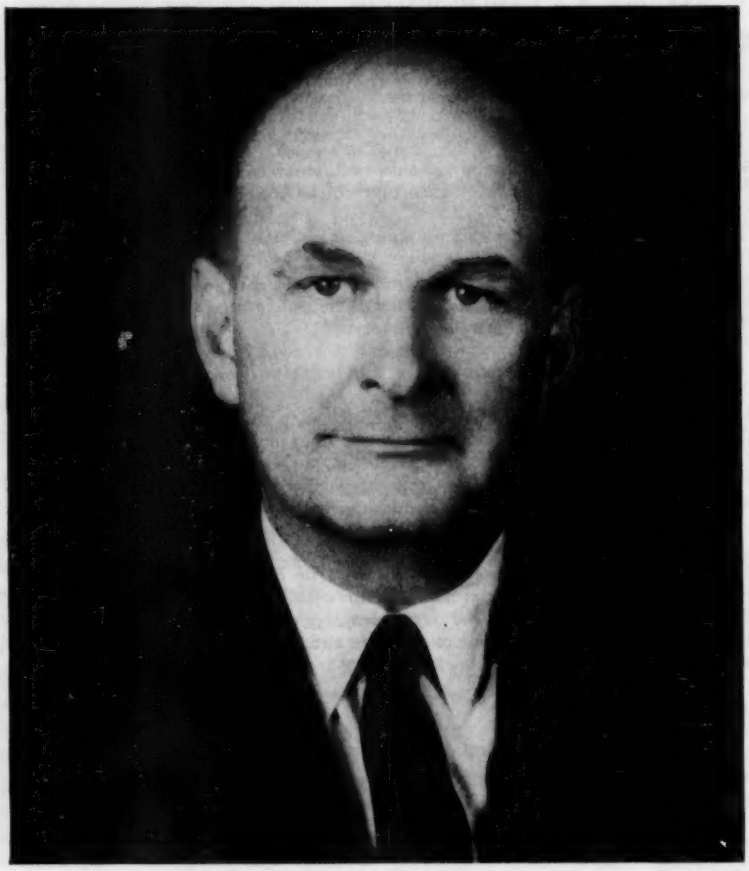
WHEREAS *a day of national dedication to the principle of government under laws would afford us an opportunity better to understand and appreciate the manifold virtues of such a government and to focus the attention of the world upon them;*

NOW, THEREFORE, I, DWIGHT D. EISENHOWER, *President of the United States of America, do hereby designate Thursday, May 1, 1958 as Law Day. I urge the people of the United States to observe the designated day with appropriate ceremonies and activities; and I especially urge the legal profession, the press, and the radio, television and motion picture industries to promote and to participate in the observance of that day.*

New Officers and Governors Nominated by State Delegates

The State Delegates, meeting on February 25 in Atlanta, Georgia, during the Midyear Meeting of the House of Delegates, nominated Ross L. Malone, of Roswell, New Mexico, to be the eighty-second President of the American Bar Association. Sylvester C. Smith, Jr., of Newark, New Jersey, was chosen as nominee for Chairman of the House of Delegates. Joseph D. Calhoun, of Media, Pennsylvania, was nominated for his second term as Secretary of the Association, and Harold H. Bredell, of Indianapolis, for his tenth term as Treasurer.

Nominated for three-year terms on the Board of Governors were Robert K. Bell, of Ocean City, New Jersey, for the Third Circuit; E. Dixie Beggs, of Pensacola, Florida, for the Fifth Circuit; and Walter E. Craig, of Phoenix, Arizona, for the Ninth Circuit.



Ross L. Malone

Mr. Malone

In selecting Ross L. Malone to be the next President of the American Bar Association, the State Delegates again evidenced the fact that leadership in the Association does not come only from the larger cities or more populous areas of the United States. Mr. Malone has practiced law for more than 25 years in Roswell, New Mexico. His practice has been twice interrupted by public service, the first time during 1942-46 when he was commissioned in the United States Navy, and again in 1952-53 by his appointment to be Deputy Attorney General of the United States.

While serving as Deputy Attorney General, Mr. Malone originated the arrangement whereby the Department of Justice submits to the American Bar Association the names of lawyers under consideration for appointment to the federal bench for recommendation as to their professional qualifications.

Born at Roswell, New Mexico, in 1910, Mr. Malone will be one of the youngest men to serve as President of the Association. He was educated in the public schools of New Mexico and at Washington and Lee University, where he received his LL.B. degree in 1932. He was admitted to the Bar of New Mexico in the same year, and has been a member of the firm of Atwood & Malone since 1937. He has been a member of the Board of Bar Examiners

Sylvester C. Smith, Jr.

of the State of New Mexico since 1949, and is a long-time Trustee of the Southwestern Legal Foundation.

In 1956 Mr. Malone received the coveted Hatton W. Sumners Award in recognition of his contribution to the improvement of the administration of justice. He is a member of the Board of Civilian Advisers of The Judge Advocate General's School at Charlottesville, Virginia. He was a member of the Task Force on Legal Services and Procedure of the Hoover Commission in 1954-55, serving as Chairman of its Task Group I. Mr. Malone served as Chairman of the New Mexico Alien Enemy Hearing Board during the early part of World War II, before being called to active duty with the United States Navy, where he served afloat in the Pacific. He is a Director of the American Judicature Society, a member of the American Law Institute, and a Fellow of the American Bar Foundation and of the American College of Trial Lawyers.

Mr. Malone's long service to the American Bar Association began as a member of the Junior Bar Conference, of which he was State Chairman for New Mexico in 1938. In 1946 he became a member of the House of Delegates, as State Delegate from New Mexico, and served in that capacity until his election to the Board of Governors in 1951. On expiration of his term on the Board of Governors, he was elected Assembly Delegate, and was re-elected to that position at the 1957 Annual Meeting in New York.

During his term as a member of the Board of Governors, Mr. Malone served as a member of the Executive and Building Committee, which had the responsibility for the planning, fund raising for and construction of the American Bar Center. He also has served on the Committees on Individual Rights as Affected by National Security, 1952-58 (Chairman, 1956-58); Regional Meetings, 1951-54; American Citizenship, 1946-49; Legal Aid Work, 1949-50; Military Justice, 1946-48; Bill of Rights, 1938-42. He has been a member of the Research Committee of the American Bar Foundation, and its predecessor, the Library and Research Committee, since establishment of the Foundation in 1953.

Mr. Malone is the author of a number of articles in the fields of oil and gas and public utility law.

His wife, the former Elizabeth L. Amis, is also a native of Roswell, New Mexico. They were married in 1934.

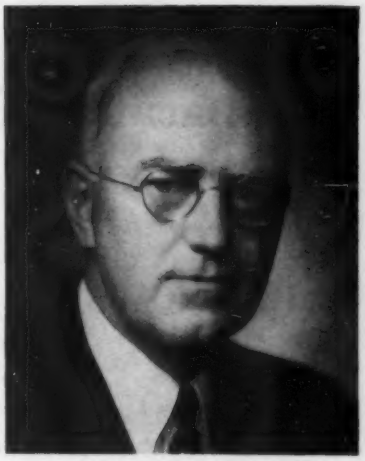
Mr. Malone is a Methodist and is a member of Phi Delta Phi and Sigma Nu Fraternity.

Mr. Smith

Sylvester C. Smith, Jr., was born in Phillipsburg, New Jersey, and was educated at Lafayette College and at New York Law School where he received his law degree in 1918. He has long been active in bar association work and has served as President of the Warren County (New Jersey) Bar Association and of the New Jersey State Bar Association.

Mr. Smith has been a member of the American Bar Association for nearly thirty-five years and has been a member or chairman of eight committees of the Association. He has been a state delegate, Assembly delegate and state bar association delegate in the House of Delegates. He was chairman of the Association's Committee on Proposals Affecting the United States Supreme Court from 1937 to 1939 and made an impressive and effective contribution to the work of that Committee. He also has served as Chairman of the Section of Administrative Law and of the Public Relations Committee, and was a member of the Board of Governors from 1940 to 1943.

(Continued on page 349)



Robert K. Bell

E. Dixie Beggs

Walter E. Craig

Comparative Negligence:

The Views of a Trial Lawyer

by Ralph C. Body • *of the Pennsylvania Bar (Reading)*

Mr. Body notes that he began as a proponent of the doctrine of comparative negligence as a replacement for the doctrine of contributory negligence. A closer look at the proposals made him change his mind. He sets forth the reasons for his change of position in this article, taken from an address delivered before the Pennsylvania Bar Association last year.

When I recently received an invitation to speak on comparative negligence before the Pennsylvania Bar Association, I made it my business to talk to some members of our county Bar about it and to various other lawyers of other counties that I know. The results of my inquiries may be summarized as follows:

(a) About 90 per cent of the lawyers had heard of the doctrine but knew nothing about it or how the rules concerning it were applied, and did not care if the law passed or did not pass.

(b) Lawyers who handle negligence cases for plaintiffs like the rule.

(c) Lawyers who handle negligence cases for defendants are against it.

(d) Lawyers in the older group who try cases only occasionally and who have been practicing more than ten to fifteen years do not want it.

(e) Younger lawyers of five years' experience or less do not know what they want or like but are interested in knowing about the doctrine of comparative negligence.

At our county Bar we have in round numbers 170 practitioners and of that number approximately ten lawyers appear in and handle over 90 per cent of the negligence cases that includes all cases on the trial list that are either settled or tried.

Please understand me, I do not consider myself an expert on the subject of negligence or the doctrine of comparative negligence, but just a country lawyer who is concerned with every phase of the general practice of law in a rural county, who is in our county trial courts five terms a year, and who has occasional work in the federal trial court. The opinions given here are my own and the judgments (good or bad) are the result of my study of this subject.

The articles and treatises that I have read lead me to the same conclusion—namely, that the whole matter is one of opinion as to which is the better rule. The opinions in most instances are the result of legal experiences and are therefore colored to the extent of the type of practice that one has had or the lack of it. Statistics on the matter from other jurisdictions are not convincing, and far from authoritative. In the vernacular of a Pennsylvania Dutch lawyer, I should say: "Figgers don't lie but figgerers do."

A Good Question . . . Who Wants It?

Do the people who are prospective litigants know anything about the comparative negligence law and are they clamoring at the doors of our legislature for the passage of this law?

It is my opinion that a great deal of private interest is involved on the part of the prospective plaintiff's lawyer who takes a case on a one-third contingent fee basis and as high as 50 per cent of the recovered damages. Naturally both lawyer and client have a real and substantial interest in the ultimate result for the client, who doesn't advance the costs, risks nothing, pays nothing and perhaps as a result there is just one more lawsuit on the Prothonotary's Docket and one more problem for an insurance carrier and its counsel. As to the plaintiff's lawyer, he risks his work, his reputation for winning, and the possible loss to his firm should he fail in a verdict or settlement.

In the event our law is changed then the lawyer's risk of loss is almost nil although his client may have been 80 per cent to blame for the accident, but a recovery of 20 per cent would be his jury verdict. So if as a result of the accident he is totally disabled, his

Editors note: At the last Annual Meeting of the Pennsylvania Bar Association, January 28-31, by a vote of 76 to 46, the Association went on record as favoring a change in the present contributory negligence rule to make contributory negligence a bar to recovery in trespass actions founded upon negligence only if a proximate cause of injury.

pain, suffering, out of pocket, impairment of earnings, past and future, etc., are determined to be $80,000 by the jury or the court, and the defendant's damages are only a repair bill of $800, then defendant must pay him $16,000 and plaintiff must pay defendant $640. The net result would be a verdict for plaintiff for $15,360 based on these calculations:

20% of $80,000	$16,000
80% of $ 800	640
Net difference	$15,360

Why shouldn't suit be filed?

If we carry this to the extreme we can have a 95 per cent and 5 per cent case, so that in almost every case the plaintiff's lawyer is sure of a verdict, sure of final success and therefore it is lucrative to the plaintiff's lawyer.

My conclusion is that there will be more suits and not fewer suits if we adopt the doctrine. Neither injured plaintiffs nor lawyers are averse to receiving money from defendants or their carriers. So there would be more rather than less congestion in the courts. The successful trial practitioner will not be faced with the rule of contributory negligence and therefore more cases will go to trial and more delay will result.

The above examples clearly prove that the change of the rule would be more harsh and create more injustice than our present rule of contributory negligence in Pennsylvania.

True enough, our law says that even the slightest negligence on the part of the plaintiff will prevent his recovery from the defendant, who may have been grossly negligent. The proponents for a change strongly say: "If you find the plaintiff guilty of 1 per cent negligence, you must find for the defendant."

However, as trial lawyers well know, the application of our rule in Pennsylvania is quite different when one actually tries a case before a court and jury.

My experience has been that the jury will disregard the plaintiff's negligence unless it approaches the quantum of negligence of the defendant and in some cases it has completely disregarded all testimony produced by the defendant when plaintiff was a poor appearing individual, and defendant was on the affluent side.

I have witnessed very few non-suits in my trial days, and have had at least two non-suits removed and new trials granted. Courts in the last decade are seeming to say: "We will let the jury decide."

In a recent case in our court, a wife of one of my friends was on the jury which was trying a case wherein $500 was claimed for damages to a motorcycle. The defendant was driving a Cadillac. At about 3:00 P.M. on the day before Thanksgiving, the jury was deliberating and the score was eleven to one for the defendant on the basis of contributory negligence. One of them contended that something should be awarded to the motorcyclist who was such a poor boy from the country and warned that she would hold out so that none would get home in time for supper. They took a vote one hour later with no success. Finally, the eleven agreed to give plaintiff $100 as a token payment, so a verdict was returned for $100. Both plaintiff's lawyer and defendant's lawyer were unhappy.

As to the courts, it seems to me that although in its charge to the jury the doctrine of contributory negligence is recognized, in actual practice the doctrine is not followed. The Supreme Court in the case of *Karcesy* v. *Laria*, 114 A. 2d 150, 382 Pa. 279, said in substance that, as a practical matter the jury does consider degree of negligence and brings in a compromise verdict. It said *inter alia:*

> Under such circumstances, a jury usually does what this jury did, namely, render a compromise verdict which is much smaller in amount than they would have awarded (a) if the defendant's negligence was clear, and (b) if they were convinced that plaintiffs were free from contributory negligence.

However, it appears that of suits filed in trespass perhaps less than 1 per cent (my opinion) are appealed to the Supreme Court. Records in Berks County show:

	1955	1956
Trespass cases filed	274	294
Appeals to Supreme and Superior Courts	3	2

Of 327 cases of trespass before arbitrators from May 3, 1954, to January 26, 1957, eight decisions were appealed to the Court of Common Pleas. Therefore, I am much more concerned with what happens at the county level. I shall try to give you two illustrations:

(A) After trying a fall-down case for about three days wherein plaintiff had called at least fifteen witnesses, including medical, I concluded that the case had an exposure verdict of about $25,000 to $35,000. Defendant had at least ten witnesses to show no negligence on the part of the defendant's department store, but no testimony as to damages.

At 11:00 A.M. the presiding judge ordered a recess and then called the trial lawyers aside. This is substantially what happened:

> "Can't you boys settle this? Come on now, Ralph, what do you say?"
>
> I said, "No liability, your Honor. Contributory negligence as a matter of law. Anyway, Joe has at no time given me a figure."
>
> Joe says, "Ralph hasn't offered me anything."
>
> I say, "Judge, what do you think?"
>
> Judge says, "About $4,000 would be a fair figure. Don't you think so?"
>
> Both Joe and I say, "We'll recommend that figure to our clients."

One half hour later a juror was withdrawn pending final settlement.

In that case plaintiff's out-of-pocket expenses were about $3,000.

I was convinced that plaintiff was guilty of contributory negligence by my yardstick, and as I think back now I wonder how any jury could have determined the percentage of negligence of the defendant because one of our defenses was that the excessive rain brought about the condition of the floor. The plaintiff was a kindly looking Pennsylvania Dutch woman, mother of several children, who was a truthful witness in fact and in appearance.

(B) In the second case all of the testimony had been completed and a motion for binding instructions had been made, contending that as a matter of law plaintiff was guilty of contributory negligence.

The motion was refused but the trial

Ralph C. Body was admitted to the Pennsylvania Bar in 1928 after completing his education at Penn State (A.B. 1925) and the University of Pennsylvania (LL.B. 1928). He is a past Chairman of the Junior Bar Association of Pennsylvania and a past President of the Berks County Bar Association. He served in the Army in the Judge Advocate General's Department during World War II.

judge said that if he were on the jury he would find plaintiff guilty of negligence. However, he thought that the case was one for settlement, and couldn't we settle it for he would like to see plaintiff get something as the defendant had ample insurance and should pay. Plaintiff's counsel would not come down and I would not raise my figure. Result—I guessed wrong—verdict for plaintiff. The jury and the judge applied the "compromise" negligence rule. My hunch was that the jury applied the Cadillac rule (see above) and, secondly, there was no gross negligence on the part of the plaintiff.

Easy for Lawyers . . . But How About Juries?

Judge Allan K. Grim kindly gave me a copy of a portion of the charge that he uses in comparative negligence cases (F.E.L.A.) in the United States District Court. It is as follows:

> If you find that the defendant railroad company was guilty of negligence which was the proximate cause of the injuries and that the plaintiff-employee was also guilty of negligence which contributed to cause of injuries, then, in the words of the statute under which this has been brought, "The fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."
>
> This means that contributory negligence is not an absolute defense or bar to the plaintiff's recovery. If you find that both defendant and plaintiff were guilty of negligence and that the negligence of both contributed to cause the injuries complained of, you will first fix the value of the full amount of damages, if any, in accordance with the instructions I am about to give you. You will then reduce this amount in the proportion or ratio which you find plaintiff's own negligence bears to the total negligence in the case. For example, if you find that plaintiff's own negligence amounted to one-half of the total negligence, you will reduce the damages you have found by one-half. If you find that plaintiff's negligence amounted to 10 per cent of the total negligence, you will subtract 10 per cent from the damages you have found and the 90 per cent remainder will be the amount of your verdict. And so forth.
>
> Of course, if you find that plaintiff's own negligence was the *sole* cause of the injuries, you will then return a verdict for the defendant railroad company.

For lawyers, those instructions are very simple, easy to read and to understand, but in the application of the rule I find much trouble.

First, I think of a jury of eight women and four men—aged thirty-five to eighty—farmer, laborer, knitter, housewife, maid, teacher, stenographer—and that's all I know, for we have not interrogated each juror. They are not professional jurors in fact, and, except for one, this is their first case in court. Now tell me how they can say 65 per cent and 35 per cent, or 75 per cent and 25 per cent. What do you think? Will it not be so much easier and more likely for the jury to say 100 per cent? What is the answer? I am sure that I don't know, but I know what I am guessing.

Some months ago I met a friend at our Legion Post who I knew had been on a jury in a case in which there were numerous questions of fact and law, and also two defendants. This is what I learned for two beers:

> "Did you enjoy your experience as a juror?"
>
> "Yes, I sure did."
>
> "I read that the verdict was against one defendant only."
>
> "Yes, one old lady that sat in the front row said 'X' defendant only, or else. So we soon agreed with her."
>
> "How did you arrive at that figure?"
>
> "Well, the highest was about $50,000 and the lowest was around $10,000—so finally after some hours we agreed on $26,500." (Figures are fictitious but proportionate.)
>
> "What about the judge's charge on contributory negligence, etc.—did you consider those items first?"
>
> "No, we didn't bother about those complicated things, we just figured the total amount."

I have been in the business of evaluating cases for over twenty-eight years, both before and during trial. I believe that I have been in and tried as many negligence cases for the plaintiff and defendant as any living lawyer at our county Bar but even so, I do not feel myself qualified to define and determine the difference between 30 per cent negligence, 45 per cent, or whatever the figure may be. And frankly, I don't think anyone can do so. It is only when the jury speaks its final verdict that the value is known and no mathematician, certified public accountant, judge or lawyer will honestly say that this can be done with any degree of accuracy.

The proponents for the doctrine know this too, and, therefore, have nothing to lose.

Under date of February 27, 1956, members of the Pennsylvania House addressed that body in favor of and against House Bill No. 667 (comparative negligence). One who favored the bill said (page 6205):

> The real test, the real question to be asked in determining should the plaintiff prevail, or should the defendant, is, what would grandma do?

The bill was defeated by a vote of 94 to 69.

I end with several observations and questions:

(a) If the present law is changed it will lead to the adoption of the prin-

ciple of liability without fault, for there are those who advocate the payment of damages to the injured even when he himself was at fault for the accident that gave rise to his claim. This, I say, is contrary to the individual responsibility that has characterized the growth of our country. Responsibility for fault is inherent in the development of a free enterprise system and the very cornerstone of democracy. It is the keystone of our human relationships.

(b) The result must be higher and more verdicts and the cost of insurance will be prohibitive. Or are you one of those who wants insurance companies to make bigger hand-outs, hoping that the premium rate will remain the same?

(c) Lester P. Dodd, of Detroit, Michigan, said in a speech to the International Association of Insurance Counsel last year:

> The inevitable result of more and more "adequate" awards which are inseparably related to more and more "adequate" fees must eventually be to compel the creation of other tribunals, and the adoption of other methods of resolving such matters, in which I believe that I can safely predict that our profession will have a less prominent part.

(d) Will the careful or careless citizen be benefitted by the doctrine of comparative negligence?

(e) What happens when there are two or three defendants and percentages must be applied to all of them?

(f) Will it increase or decrease the number of cases pending in our trial courts?

Until recently I favored the adoption of the doctrine of comparative negligence in Pennsylvania but now, I not only argue against its adoption but I sincerely and honestly contend that I do not want the doctrine of comparative negligence in Pennsylvania. It is a dangerous step that will promote the disease of "Claimitis".

Officers and Governors

(Continued from page 345)

Mr. Smith has been general counsel for the Prudential Insurance Company of America since 1948.

On March 1, a few days after his uncontested nomination to the Chairmanship of the House of Delegates, Mr. Smith suffered a tragic loss in the untimely death of his wife, Thalia, who was known and admired by many members of the Association.

Mr. Bell

Robert K. Bell has been a member of the New Jersey Bar since 1925 and was admitted to the Pennsylvania Bar in 1924. He was educated at Bucknell University, B.S., 1920, and the University of Pennsylvania, LL.B., 1924. He was President of the New Jersey State Bar Association, 1949-1950, and of the Cape May County Bar Association in 1932. He was a member of the Executive Committee of the National Conference on Uniform State Laws, 1949-1951, and is a life member of that organization. He is a Director of the American Judicature Society, a former Director of the National Legal Aid Association, a Fellow of the American Bar Foundation and a Patron of the International Bar Association. He has been a member of the House of Delegates of the American Bar Association since 1950, and is a member of the Committee on Lawyer Referral Service.

Mr. Bell is a Director of the New Jersey State Chamber of Commerce, Treasurer of the Ocean City Tabernacle Association, Economic Ambassador of the State of New Jersey and Director of the Atlantic City Electric Company. He is a former Trustee of Bucknell University.

Mr. Bell is married and has two daughters and one son.

Mr. Beggs

E. Dixie Beggs was born in Pensacola, Florida, and received his A.B. and J.D. degrees from the University of Florida in 1931. He was State Attorney for the First Judicial Circuit of Florida, 1933-1941. From 1941 to 1945 he was an infantry officer in the U. S. Army, receiving the Legion of Merit, Bronze Star Medal, Order of British Empire and the French Croix de Guerre. He was President of The Florida Bar, 1947-1948 and has served as State Delegate from Florida to the House of Delegates of the American Bar Association since 1950.

Mr. Beggs has been a member of the Florida Judicial Council since 1953, is a member of the Board of Directors of the American Judicature Society, a Fellow of the American Bar Foundation, a Fellow of the American College of Trial Lawyers and a member of the American Law Institute. He was Chairman of the Bill of Rights Committee, 1954-1957.

Mr. Craig

Walter Early Craig was born in Oakland, California, and received his education in the public schools of Oakland and Phoenix, Arizona, and at Leland Stanford University, A.B. 1931, and LL.B, 1934. He has been active in bar association work for many years and was President of the Maricopa County Bar Association (1941); Secretary, State Bar of Arizona (1947-1949); member of the Board of Governors, State Bar of Arizona (1949-1953); President, State Bar of Arizona (1951-1952); Vice President, Interstate Bar Council (1955-1956); President, Interstate Bar Council (1956-1957).

He has been a member of the House of Delegates since 1947 and has been a member of the Committees on Legal Aid and Jurisprudence and Law Reform. He has also served on the Advisory Board of the AMERICAN BAR ASSOCIATION JOURNAL.

Mr. Craig is a Director of the American Judicature Society, and a member of the Arizona Judicial Council.

He is married and has a son and a daughter.

A Continuing Professional Problem:

Ethics and the Unauthorized Practice of the Law

by Edwin M. Otterbourg • *of the New York Bar (New York City)*

"The public, far more than the lawyers, suffers injury from unauthorized practice of law. The fight to stop it is the public's fight. No man is required to employ a lawyer if he does not wish to. But every man is entitled to receive legal advice from men skilled in law, qualified by character, sworn to maintain a high standard of professional ethics, and subject to the control and discipline of the court." Quoting these words of the Iowa Supreme Court, Mr. Otterbourg makes a strong case against the position of some who urge that the profession "come to terms" with "new rivals and collaborators", so-called specialists in various phases of subjects related to the law.

An aerial navigator writing recently about clouds and thunderstorms, lightning and air currents and other phenomena demonstrated how very little, after all, we human beings really know. Doubtless this is true about nearly every subject. However, we lawyers at least should know that the topics of ethics and unauthorized practice of law constitute two interrelated and intertwined subjects.

But many of our most highly respected law teachers seemingly believe that ethics and unauthorized practice of law can be regarded separately, as though each occupied its own vacuum.

Not only this, but some judges and lawyers still think that legal ethics is a sort of philosophy of perfection, to ascertain how many angels can dance on the point of a needle. They attempt to discuss the economic impact of unauthorized practice of law without understanding that moral issues and vital public protections are both at stake.

Some even seem to disregard the history of the legal profession and demand that we modify our professional ethics and appease those, who in disregard of the public interest and without authority, are invading our professional field.

Thus recently, Professor Elliott E. Cheatham of Columbia University wrote:

> The twentieth century brought an enormous extension of knowledge. Following close behind the extension of knowledge by the scientists was the development of new groups whose function it is to apply this knowledge to human affairs. They like to call themselves professions, since it is of the essence of a profession that its members apply accumulated knowledge to the individual cases of clients. . . . The American passion for efficient large-scale methods has led to the title company, the trust company and the collection agency. The Bar is under the necessity of *coming to terms* with these new rivals or collaborators. At least, it must take measures to see to it that the new expertness is made *available* in some way to clients who need it.[1] [Italics added.]

How "come to terms"? How make "available"?

To follow some of these implications to their logical conclusion would deprive the public of numerous safeguards now contained in statutes against unauthorized practice of law and in the Canons of Ethics, to say nothing of standards of competency and of the teaching of law. As to what would become of the requirements of undivided loyalty to the interests of the client, of the confidential relationship between lawyer and client, and, indeed, of the practice of law as a profession and not as a business, the quoted statement is eloquently silent.[2]

To sweep away some of these cobwebs, a few definitions may be helpful.

The Law Is a Profession of Public Service

Dean Roscoe Pound has written recently that a profession as distinguished from a business represents three essential ideas, to wit, organization, learning and, above all, a spirit of public service.[3]

1. Cheatham, CASES AND MATERIALS ON THE LEGAL PROFESSION, 2d Ed., 461, 462.
2. 38 JOURN. OF THE AMERICAN JUDICATURE SOCIETY, 131-132 (1955).
3. Address of Dean Roscoe Pound to the Nebraska State Bar Association, October 20, 1949: ". . . What we mean by the term profession when we speak of the old recognized professions (medicine, the law and the ministry). We mean an organized calling in which men pursue a learned art and are united in the pursuit of it as a public service—as I have said, no less a public service because

When Judge Cardozo wrote that "membership in the bar is a privilege burdened with conditions"[4], many of these had already been defined by our Canons of Ethics. These, of course, apply to every lawyer, whether he be a general practitioner or a specialist, whether he be practicing alone or in partnership with other lawyers.

Statistics show that more than three fourths of all of the lawyers of the country are in private practice and these, with but rare exceptions, are living up to professional ethical standards of practice. The great majority of our American lawyers still come under the definition of a "Main Street Lawyer", of whom it has been written:

> . . . As an individual member of the profession he glorifies in his independence and his individuality. He of all men has truly been a free agent. There never has been and there is not today any calling or profession that is more independent. But today the existence of that independent professional life is being threatened. . . . In sober, conscious truth, the average Main Street lawyer is the principal guardian of the traditions of our profession and of the best that there is in our civic and social life. He has been less affected by the back wash of the materialistic age. He has not been so directly or indirectly subsidized by the economic urge which is the dominant characteristic of this day. If there is any virtue in an independent individualistic and detached status in our profession then the Main Street lawyer is today largely the depository of that virtue.[5]

Innumerable definitions of unauthorized practice of law by statute and decided cases can be found collected in Volume 33 of *Words and Phrases*. One will suffice,—that of the high court of Iowa, to wit:

> The public, far more than the lawyers, suffers injury from unauthorized practice of law. The fight to stop it is the public's fight. No man is required to employ a lawyer if he does not wish to. But every man is entitled to receive legal advice from men skilled in law, qualified by character, sworn to maintain a high standard of professional ethics, and subject to the control and discipline of the court. Not only this, he must be served disinterestedly by a lawyer who is *his* lawyer, not motivated or controlled by a divided outside allegiance.
>
> Unauthorized practice of law is the attempt by laymen and corporations to make it a business for profit of giving the public as a substitute, the services of unqualified and unprofessional persons, or to employ and furnish for profit, directly or indirectly, the services of lawyers who may be willing to sabotage professional ethics in order to secure employment.
>
> In either case, the public is cheated: either by receiving incompetent and unethical advice, or by being served by lawyers who are not disinterested, whose real client is not the person advised but the entrepeneur furnishing the services.[6]

Long ago, because of "sundry damages and mischiefs" to the public by "attornies, ignorant and not learned in the law", Parliament in 1402 passed a statute that examinations for lawyers be required, that they shall be "virtuous, and of good fame", and take a solemn oath to serve "well and truly".[7]

Over 250 years ago in Massachusetts every lawyer was required to take the following oath:

> You shall do not falsehood, nor consent to any to be done on the court, and if you know of any to be done you shall give knowledge thereof to the justices of the court. . . . You shall not wittingly or willingly promote, do or procure to be sued any false or unlawful suit, nor give aid or consent to same. You shall delay no man for lucre or malice, but you shall use yourself in the office of an attorney within the court according to the best of your learning and discretion, and with all good fidelity as well to the courts as to your clients.[8]

From these came many leaders of our early Bar and their ethical ideals and spirit of public service were high. In the generations prior to the Revolution, most American lawyers were graduates of colleges and many had studied at the Inns of Court in England.

During this time lawyers were so highly regarded that of the fifty-six who signed the Declaration of Independence, twenty-five were lawyers, and of the fifty-five who framed and signed the Constitution of the United States, thirty-one were lawyers.

But after the Revolution came the rapid growth of the United States. With the settlement of the West, there came a wild era of so-called "frontier law". Urged on by the coming of railroads and the rapid settlement of vast areas, services were often demanded of lawyers, legislators and even judges, which were wholly devoid of ethical standards and which would be denounced as abhorrent today.

Although from the beginning American lawyers continued to be public servants and leaders in their communities,[9] nevertheless, during the first part of the nineteenth century there was a legislative breaking down of the requirements of education and professional training of lawyers.[10] Indeed, some legislation in this era sought to open the practice of law to all. The organized Bar was characterized as a "secret trade union", and in 1838 a writer denounced bar associations as being "wrong in principle, betray competition, delay professional freedom, degrade the Bar".[11]

Hence from 1836 to 1870 there was a decadent period when the Bar almost gave up its idea of being a profession.[12] As a result, in new and unsettled communities, men were sworn in as lawyers and judges without examination, and without possessing requisite qualifications of character and competence. Neither the legal profession as a whole nor American big business felt any restraint whatever because of ethical standards worthy of mention.

Professional conditions indeed had sunk so low that something had to be done and so, in 1878, leaders of the Bar gathered and organized the American Bar Association, announcing among its many purposes not only the advancement of the science of juris-

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they make a livelihood thereby. Here, from the professional standpoint there are three essential ideas:—organization, learning, and a spirit of public service. The gaining of a livelihood is not a professional consideration. Indeed, the professional spirit, the spirit of a public service, constantly curbs the urge of that instinct."

4. 248 N. Y. 470.

5. A. M. Kvello, *The Lawyer from Main Street*, 31 Rep. South Dakota Bar Association 233 (1930).

6. *Bump* v. *District Court of Polk County*, 232 Ia. 623.

7. Statute of Henry IV, c. 18.

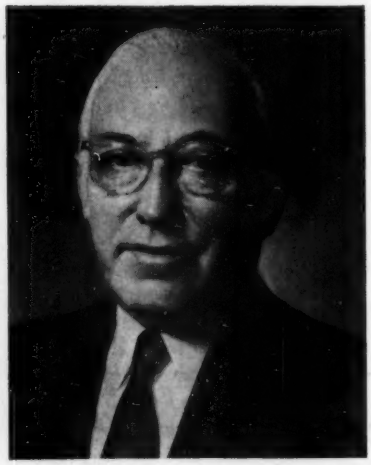
8. Washburn, Judicial History of Massachusetts 189

9. Stille, Life and Times of John Dickinson 28.

10. Reed, *Training for the Public Profession of the Law*, Bulletin 15, Carnegie Foundation for the Advancement of Teaching, 67, 68.

11. Wickser, *Bar Associations*, 15 Cornell Law Quarterly, 390, 394 (1930).

12. Brand, *Bar Organization and Judicial Administration*, 34 Journal American Judicature Society, 38, 39 (1950)



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prudence and the promotion of the administration of justice, but also *to uphold the honor of the profession of the law.*

But even with the organization of the American Bar Association, except for a Code adopted in Alabama in 1887, no Codes of Ethics had been provided for the profession of the law nor, for that matter, for any other business or profession.

Sharswood's Ethics . . . A Professional Classic

Little if anything of importance was said or written about ethics except that in 1852, Judge George Sharswood, of Philadelphia, wrote "An Essay on Professional Ethics" which has since become a classic in our profession.

But when Theodore Roosevelt became President, he demanded decency, morality, honor, integrity and fair play by business generally. He stressed not only the daily practicality of his ideals, but also insisted that the public required the application of ethics in both business and professional life. He attacked corruption, lack of idealism, lack of ethics in all directions and in our profession especially. Finally he appeared before the graduating class at Harvard University in 1905, saying:

> This nation never stood in greater need than now of having among its leaders men of lofty ideals, which they try to live up to and not merely talk of. We need men with these ideals in public life, and we need them just as much in business and in such a profession as the law. . . . The great profession of the law should be that whose members ought to take the lead in the creation of just such a spirit.[13]

This address together with the low ethical state of the law caused the American Bar Association to adopt its Canons of Ethics in 1908. Within ten or twelve years, more than 200 ethical codes were adopted by many professional and business groups. For example, the American Medical Society adopted a Code in 1912 and even the National Association of Credit Men adopted one which declared that

> It is improper for a business man to participate with a lawyer in the doing of an act which would be improper and unprofessional for the lawyer to do.
>
> It undermines the integrity of business for business men to support lawyers who indulge in unprofessional practices. The lawyer who will do wrong things for one business man injures all business men. He not only injures his profession, but he is a menace to the business community.[14]

Committees on ethics were appointed by the American Bar Association and many local associations, and by 1914 Canons of Ethics had been adopted by more than thirty state bar associations.

It was obvious that by fighting unauthorized practice of law at the same time, the ignorant and the unwise could be protected from having foisted upon them so-called legal advice and service by the unqualified.

Almost simultaneously, therefore, with the appointment of committees on ethics, committees were also appointed by most of the state and local bar associations to fight unauthorized practice of law, and by 1941 there were over 400 of these at work.[15]

The organized Bar had by now recovered from its period of decadence and proceeded not only to preserve the law as a profession, but also to protect the public from unauthorized practitioners.

Meanwhile the courts had taken up the cudgels of reform. In New York its highest court made landmark decisions that a corporation could neither practice dentistry[16] nor medicine[17] nor law[18]. Legislatures in all of the states enacted statutes making it a crime for a non-lawyer or corporation to practice law.[19]

Important groups of businessmen then began communicating to the Bar that they did not wish to be law violators, and many conferences and meetings then resulted in the adoption of agreements as to ethical principles between lawyers and businessmen. These are called "Statements of Principle" and without exception emphasize the ethical requirements involved. These statements are so important that they are published annually in the Martindale-Hubbell Law Directory and continue to be reprinted and redistributed. It has been and continues to be a campaign of education both for business and for the Bar.

As a result, it can now be said that business has substantially agreed to the same ethical principles which are the bases of Canons for lawyers in their dealings with their clients. An unauthorized practitioner in most cases can be brought face to face with written expressions officially made by his own confreres that what he is doing is improper. Unfortunately, such an offender has usually some member of the Bar with whom he has been collaborating.

To put a stop to this, in 1937 Canon 47 was adopted, directly affecting such lawyers, which reads:

> No lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate.[20]

13. 28 A. B. A. Rep. 383.
14. Canons of Ethics of National Association of Credit-Men (1913).
15. See 1955 Reports of Ohio State Bar Association, Milwaukee Junior Bar Association, Wisconsin Bar Association, 21 Unauthorized Practice News (June, 1955).
16. *Hannon v. Siegel Cooper Co.*, 167 N.Y. 244 (1901).
17. *People v. Woodbury*, 192 N. Y. 454 (1908).
18. *The Cooperative Law Co.*, 198 N. Y. 479 (1910).
19. Otterbourg, A Study of Unauthorized Practice of Law, Appendix, 61-72, Survey of the Legal Profession.
20. Canon 47.

In September, 1951, the American Bar Association set out officially six long-range objectives as being the policies of the organized Bar, among which is

> (4) The maintenance of high standards of legal education and professional conduct to the end that only those properly qualified so to do shall undertake to perform legal service.[21]

Thus in the public interest, as well as the safeguarding of our own profession, we are pledged to continue this fight and to aid in the enforcement of the laws of the several states relating thereto.

Some further developments are worthy of notice.

Certified public accountants had refused to recognize that the practice of the law of taxation is the same as that of any other kind of law, involving as it does all or most of the parts of the "seamless web" of the law.

The Bar's position is that whenever questions of law arise in a matter with which an accountant is concerned, he should bring in a lawyer and, likewise, lawyers should bring in an accountant when the latter's services as an expert are required. Leading cases on this subject are *In re Bercu* in New York[22], *Gardner* v. *Conway* in Minnesota[23], and *Agran* v. *Shapiro* in California[24]. In the *Bercu* case the certified public accountant gave a written opinion as to a question of law. In the *Conway* case an uncertified accountant performed legal services. In all of the cases mentioned the accountant in question was found guilty of practicing law.

In the *Agran* case the accountant, who was admitted to practice before the Treasury Department rendered essentially legal services.

Treasury Department Circular No. 230 contains prohibitions about accountants drawing certain kinds of legal documents. It is expressly provided "that nothing in the regulations in this part shall be construed as authorizing persons not members of the bar to practice law".

Since the decision in the *Agran* case, some efforts were made on behalf of the accountants to have Circular No. 230 amended by eliminating that provision.[25]

Dean Griswold of Harvard Law School, speaking before the Tax Section of the American Bar Association in Philadelphia on August 21, 1955, in a masterly address, indicated a greater necessity exists in this field for better understanding and an appreciation by the accountants of the grave considerations involved.

In addition, the American Bar Association appointed a Special Committee on Professional Relations which met with the accountants and which obtained from the Secretary of the Treasury an interpretation of that portion of Circular No. 230 (81 *A.B.A. Rep.* (1956) page 536).

There is a national statement of policies between the American Bar Association and the American Institute of Accountants, and if these are carried out both in spirit and intent, and the law of the land and the rules of the Treasury Department are complied with, there should be no further trouble between the two professions.

If We "Come to Terms" . . . A New Era of Decadence

To listen to those who would "come to terms" with laymen seeking limited licenses to practice law in some specialty, or who would countenance a revision of our Canons of Ethics against divided loyalties, intermediaries, fee splitting, and the like, would usher in a new period of decadence for the American Bar.

The high court of New Jersey has laid down a rule limiting the activities of a so-called labor relations "adviser" to those trade matters in which he was expert, but excluded his legal services.[26]

Offenders claim that they do not misrepresent themselves as being lawyers and that, therefore, their clients know that they are serving either as accountants, labor consultants or real estate brokers, as the case may be. Their argument relies on the false premise that the rule of *caveat emptor* applies to the public when it employs them to give legal services.

This argument is fallacious. The rules limiting and defining who shall practice law and our legal codes of ethics exist precisely because legislators and the courts have never believed that *caveat emptor* applies in this field.

Hence, the New York Court of Appeals said:

> To make it a business to practice as an attorney at law, not being a lawyer is the crime. Therefore, to prepare as a business legal instruments and contracts by which legal rights are secured and to hold oneself out as entitled to draw and prepare such as a business is a violation of the law.[27]

In a New York case, a distinguished Mexican lawyer was occupied in giving advice to New York citizens as to Mexican divorce and other law, and the foregoing principle was applied by the court which enjoined him, saying:

> Respondent must be deemed to be a layman in this state and not authorized to give legal advice or render legal services to persons in this state. Advice given to the public by one holding himself out to be a "consultant" in the law of his specialty, although not fully admitted to the Bar of this state, constitutes the unlawful practice of law. [Citing the *Bercu* case, *supra.*][28]

The New York Court of Appeals affirmed the lower court.[29] The passage from the affirming opinion reads:

> In the present case we are dealing with the conduct of a person who renders legal services to the public as a business. While it is true that he renders only specialized services dealing with a field in which he claims to be peculiarly competent, the competence of appellant in the practice of his specialty is not dispositive of the case before us. In many fields of endeavor laymen acquire specialized knowledge which is relevant to the practice of law in that area. Thus accountants may know a great deal about tax law and labor consultants much about labor law. A specialized area of competence does not, however, entitle these laymen to engage in the

(*Continued on page* 393)

21. 76 A. B. A. Rep. 111 (1951).
22. *In re Bercu*, 273 App. Div. 524; *affirmed* by Court of Appeals without opinion.
23. *Gardner* v. *Conway*, 48 N.W. 2d 788.
24. *Agran* v. *Shapiro*, 273 Pac. 2d 619.
25. See discussion of both sides. 21 Unauthorized Practice News, Vol. XXI, No. 2 (June, 1955).
26. *Auerbacher* v. *Wood*, 142 N. J. Eq. 484.
27. *People* v. *Alfani*, 227 N. Y. 234.
28. *Matter of New York County Lawyers' Association*, 207 N. Y. Misc. 698.
29. *In re Roel*, 3 N.Y. 2d 224, 144 N.E. 2d 24.

No Heaven on Earth:

Compensation for Automobile Victims

by George E. Tyack • *of the Ohio Bar (Columbus)*

In the May, 1956, issue of the JOURNAL, Robert S. Marx, of Cincinnati, argued for the adoption of a "compensation" system, somewhat like Workmen's Compensation, for victims of automobile accidents. Mr. Tyack thinks that it would be a mistake to adopt such a system, for a variety of reasons which he sets forth here.

I have followed with considerable interest most of the articles pro and con with regard to compensation for automobiles' victims. I am particularly interested in that of Robert S. Marx, of the Ohio Bar (42 A.B.A.J. 421, May, 1956).

It is utterly fantastic how little is actually known and understood of the workings of the compensation systems of the various states and of the United States Government. The general public seems to think that compensation is a heavenly thing. The uninjured (who never expect to be injured) think it is a great system for those who are injured. Those who are actually injured and face to face with reality and the problems of compensation know better.

As to the proposed "compensation system" for automobile injuries, we do not believe for one minute that any of the so-called "opponents" of such a system are actually opposed to the victims' receiving money or treatment or anything else to relieve their distress. These "opponents" are opposed to the system because it will not do what it promises to do any more than the Workmen's Compensation system does what it promised and has not yet accomplished after forty-odd years.

No one would oppose "prompt compensation to the innocent victims of automobile accidents," as stated by Judge Marx. The theory is wonderful, and if a plan can be worked out it will be all to the good.

However, to assume that "prompt and equitable" compensation can be accomplished through a Workmen's Compensation-like system is to show lack of knowledge of the workings of the Workmen's Compensation system of the various states, including that of Judge Marx's home state.

As with most bureaucratic systems and socialistic plans, Workmen's Compensation penalizes the industrious worker. The skilled workers whose weekly salaries exceed $150 per week such as steel workers, carpenters and so forth, receive no more for their "compensation" to support their families and maintain their standards of living during prolonged disability periods than do the dishwashers, janitors or delivery boys who may make less than half of the skilled worker's wage. Only in Alaska and Arizona is this not true.

In the matter of permanent disabilities, the schedules are so low as to be appalling. The interpretation of the percentage of disability by the salaried examiner further lowers the amount and in all of this, remember the decision of the administrator or the board is final. No court or jury under the average compensation system can award you more. The state's examiner speaks and that is it.

Now, in our enlightened State of Ohio (which is above the average in benefits according to the survey recently made by the United States Department of Labor), 100 per cent permanent partial disability, where there is no actual amputation of a member, cannot exceed $8,050. It is the duty of the compensation board to conserve the fund. It will no doubt be the duty of the automobile accident board to conserve the automobile accident fund! Therefore, few people realize anything near the amount of $8,050. Broken backs go for $1,000 and $2,000 even in uncontested cases.

Of course if the claimant becomes permanently and totally disabled, he may eventually achieve the ultimate of $40.25 per week for life but, unless this occurs immediately through the loss of two major members, repeated hearings and delays are necessarily involved. The Board cannot pay out money until it is sure. The same conservative restrictions will have to apply to and govern the automobile accident board!

We feel sure that the proponents of a compensation system for automobile accidents are not aware of what they are proposing. This is surely true, or they would not compare it to the Saskatchewan program.

In this respect, notwithstanding the universal knowledge and acceptance that Workmen's Compensation abolishes personal injury suits and abolishes the concept of liability for fault, Judge Marx blandly states that "The law of Saskatchewan does not abolish personal injury suits!"

This is truly anything but Workmen's Compensation. If we should call it what it really is, we should say it is an insurance program added to the rights which we already have to bring suit against the defendant for negligence. If injured workingmen were permitted to sue for damages when they were dissatisfied with their compensation, then you may be well assured that 100 per cent of the cases involving more than mere medical expense would have their day in court.

Thus, it would appear with all respect to Judge Marx and others sincerely seeking to improve a bad situation that they are not talking about or supporting the system which our legislators would give us. We are perfectly sure that our legislators in considering "a Workmen's Compensation" setup for automobile accidents would have in mind just that. They would not have in mind the Saskatchewan system or any other system which would add insurance and yet permit us to sue in court on the basis of liability for fault.

In setting up a Workmen's Compensation system for automobile accidents, we must constantly bear in mind that this system will apply to us, our families and friends. We are not talking about some far away or remote situation nor are we considering something in the abstract. It is you, your wife or your daughter who will be reporting to the state's examiner every three or six months to be "evaluated" and then waiting for the board to decide whether or not you are entitled to your three or six or nine dollars for another short period of time.

It may be members of your family who will wait and wait for a ruling which no one can hurry, only to learn that the doctor decided that you were "neurotic", for which there is no payment and from which decision there is no appeal. This is surely not the system that the proponents wish to apply to themselves; and as to expense, once the bureaucratic growth is started the cost for hundreds of clerks, stenographers, statisticians, auditors, actuaries, doctors, lawyers; thousands of typewriters, filing cabinets, International Business Machines, adding machines, electronic devices, buildings, rents, paper and all of the other things now paid for by the litigants, will far outstrip any possible costs of building new courthouses all over the land.

However, society must never cease and will never cease to create newer and better methods of handling social problems. We must be grateful to the proponents of a change in the matter of automobile accidents; grateful for their awareness of the existence of the problem in the first place and appreciative of the high drive which impels them to seek something better for all of us. However, we respectfully submit that the search for the solution to the instant problem is not finished and that a short cut to a "Workmen's Compensation system" would create an infinitely greater problem.

It is certain that we must not be in any rush to surrender long-cherished rights and time-honored procedures, at least until the various proponents of a change are no longer confused and are talking with an understanding of that which they propose.

Manuscripts for the *Journal*

■ The JOURNAL is glad to receive from its readers any manuscript, material or suggestions of items for publication. With our limited space, we can publish only a few of those submitted, but every article we receive is considered carefully by members of the Board of Editors. Articles in excess of 3000 words, including footnotes, cannot ordinarily be published.

Manuscripts submitted must be typewritten originals (not carbon copies) and must be double or triple spaced, including footnotes and any quoted matter. The Board of Editors will be forced to return unread any manuscript that does not meet these requirements.

Manuscripts are submitted at the sender's risk, and the Board assumes no responsibility for the return of material. Material accepted for publication becomes the property of the American Bar Association. No compensation is made for articles published and no article will be considered which has been accepted or published by any other publication.

Books for Lawyers

MUNICIPAL LAW. *By Charles S. Rhyne. Washington, D. C.: National Institute of Municipal Law Officers. 1957. $22.50. Pages 1125.*

A city praetor is reported to have declared in his inaugural, "I shall not deviate from impartiality on the one hand or from partiality on the other". To make this review completely objective and to "deviate from partiality" is going to be difficult, because of the reviewer's long acquaintance with Rhyne, regard for him and admiration for his contributions to the law and to the Bar as author, editor, legal adviser, counsel and officer. Few legal writers have the breadth of experience in various phases of municipal law and as ready access to unusual source material possessed by the long-time general counsel of the National Institute of Municipal Law Officers (NIMLO). "NIMLO comprises more than a thousand cities and is operated by their chief legal officers. . . . This group of lawyers advises cities daily on their legal problems and programs. In writing this volume as a handbook for their daily use, these municipal attorneys' ideas of scope and utility have been followed insofar as possible." (Preface, v.)

The effort and care that have gone into this tome must have been prodigious. There are 980 pages of double-column text and citations in notes, fourteen pages plus of a double column table of contents, and an excellent forty-five double page index. It is remarkable how much is included and how well and tersely covered in this single volume.

The space to be allotted in a book like this to various topics, their sequence, and which merit separate chapters, are largely *de gustibus*. "Zoning and Planning" has been accorded a generous Chapter 32, of 170 pages plus, with zoning "airport approaches" and "against airports" given four additional pages (489-492) in Chapter 22, "Airports". Chapter 8, "Municipal Officers and Employees", comprises 112 pages, with a too short, only four-page paragraph F, "Civil Service". Chapter 26, "Municipal Police Power" (111 pages), should have included some cross reference to zoning, which derives its authority from the police power (*Gordon* v. *City of Wheaton*, 146 N.E. 2d 37 (advance sheets January 1, 1958)). Chapter 4, "Municipal Powers and Functions Generally", is granted only seventeen pages, of which a scant three are allotted to "Home Rule Powers" in Section 4-3. Most text and case books give a separate chapter and more space to home rule and the greater opportunities for development it vouchsafes, by its freedom from lack of enabling state legislation or from the constraint by strict construction of grants of powers to municipalities.[1] Other subjects deemed worthy of separate chapters are: Chapter 11, "Federal-City Relations", twenty-four pages; Chapter 12, "City-State Relations", nine pages; Chapter 13, "Extraterritorial Powers and Relations", nineteen pages; Chapter 19, "Parking and Parking Facilities", thirteen pages; Chapter 25, "Public Housing, Slum Clearance, Urban Redevelopment and Urban Renewal", nine pages.

Mechanically, the book is excellent. It is of convenient size for ready use, with good twelve-point print for the text and the smaller print for the cases in the notes (which occupy an average of about half of each page) made easier for finding the jurisdiction desired, by bold-faced printing of the abbreviated name of the particular state or federal court. One misprint, only (page 108, Section 7-9), an unimportant "i" for an "o", was discovered.[2]

Many writers and codifiers prefer, as simpler and more flexible, numbering sections by chapter number first, followed by decimals, instead of, as in the book, followed by a dash and number. Also, it would have been helpful for quicker use of the book, especially where a section requires several pages (*e.g.*, Section 8-35, pages 170-176; Section 8-39, pages 179-184; Section 8-51, pages 199-205); if, at the top of each even numbered page, there had been printed, instead of "MUNICIPAL LAW", the abbreviated name and beginning page number of the chapter and section in which the text appears.

There are practically no observed inaccuracies of statement.[3] Also, there is very little repetition in the book. Some of it, had there been more cross references[4] would have been more justifiable as affording easier reading in the context where placed than by resort to the cross references. As it is, with respect to the few repetitions without cross references occurring, the careful reader may recall an earlier passage and wish to compare text and notes in both places.

The foregoing are probably rather slight spots on so effulgent a legal sun; and, an analyst would conclude, are unconsciously motivated by desire "to deviate from partiality" for the author.[5]

1. *Benjamin* v. *City of Columbus*, 167 Ohio St. 103, 109, second paragraph of the syllabus, December, 1957. In 1948, there were about 650 home rule communities. Today there are more than twice that number. THE AMERICAN CITY, December, 1957.

2. *Cf.* morning newspaper report of the trial of a lawyer for contempt and stumbling into accuracy with a one-letter misprint. "Mr. Sh— exclaimed indignantly he had been practicing law in Cincinnati for thirty years."

3. However (page 8, §1-5, note 21), the council-manager plan, the name preferable to city-manager plan, is in use in almost twice as many places as in the "about 800 cities" referred to. The 1957 MUNICIPAL YEAR BOOK, page 261, says that as of January 1, 1957, there were 1180 cities in the United States of 1,000 or more population with council manager form of government. *Cleveland Bureau of Governmental Research Bulletin*, No. 27, issue of October 7, 1957, says that as of August 1, 1957, there were 1513 places (including counties) with council-manager form of government and the number is continuing to grow with very few abandonments. See, also, for additional adoptions, 47 National Municipal Review 26 (January, 1958), Council-Manager Plan Developments. The February, 1958, issue of 47 N. M. R. at page 71 says that as of January 1, 1958, the list has reached 1550. It should also have been said in Sec. 1-5, note 18, with respect to the commission form of government, that its popularity has greatly decreased and why, so that it is, since 1912, almost obsolete. Seasongood, *Forms of Government in the United States*, MUNICIPAL REVIEW OF CANADA, October, 1944, reprinted in THE PRACTICE OF EXPOSITION, Bachelor and Haley (pages 49, 50), Appleton-Century, 1947.

4. Such as Section 30-25, PUBLIC UTILITIES, AIRPORTS, page 776, note 12, cross reference to §22-20, page 487 "F", *Tort Liability of Airport Operators*.

5. Just as weak judges decide, apart from the merits, against friends or former associates; and not like the critics in FANNY'S FIRST PLAY, who had to be given the name of the author because, when they knew who it was (Shaw), they could praise the play.

Municipal Law was written to be a quick reference book and it will be most serviceable when an almost immediate legal opinion is required; or, in instances where time is available, as a starting point for further research and the latest authorities. Naturally, any volume cannot include conflicting, creating-a-doubt or landmark cases which have an unpleasant way of appearing after a book is printed. Examples are:

Hargrove v. *Town of Cocoa Beach, Florida*, 96 So. 2d 130 (June 28, 1957), which held a city liable in damages for the negligence of a jailer, acting, of course, in the city's governmental capacity, and said (page 133 top):

> The modern city is in substantial measure a large business institution. . . . To continue to endow this type of organization with sovereign divinity appears to us to predicate the law of the Twentieth Century upon Eighteenth Century anachronism.
>
> We therefore now recede from our prior decisions which hold that a municipal corporation is immune from liability for the torts of police officers.

True, *Hargrove* and Rhyne, too (page 9, note 22), cite approvingly *Kaufman* v. *City of Tallahassee*, 84 Fla. 634, 94 So. 697, 30 A.L.R. 471 (1922). But neither highlights the real and untenable basis of that decision, *i.e.*, holding the municipality liable for negligent operation of a fire truck because of the city's form of government under the commission plan, which form was said to place the municipality in a class analogous to that of a private or business corporation. (As if any modern city were not!) *Hargrove* may be contrasted, so far as concerns *stare decisis*, with another too recent to be included decision, *Broughton* v. *City of Cleveland*, 167 Ohio St. 29 (November 20, 1957), arriving at an opposite conclusion and following precedent with the usual formula that if liability is to be imposed in such cases, it should be by the General Assembly and not by the court. The syllabus is that a municipal corporation engaged in the health preserving service of collecting garbage for its inhabitants is in the exercise of the police power and is performing a governmental function; and one who is injured by the negligence of a municipal employee while loading a garbage truck may not successfully maintain an action for damages against the city. The court said that Ohio had consistently followed and applied this rule (apparently disregarding (see Rhyne, page 732, note 15) its *Fowler* v. *City of Cleveland*, 100 Ohio St. 158, 126 N.E. 72 (1919), recanted from in *Aldridge* v. *City of Youngstown*, 106 Ohio St. 342, 140 N.E. 164 (1922), cited) and added:

> Perhaps we are behind the times, but, in the absence of legislation by the General Assembly, this court is not yet ready to abandon the position adopted and retained for so many years.

To be reckoned with by municipal legal and enforcement officers is a new five-to-four decision, *Lambert* v. *People of the State of California*, 355 U.S. 225, 937, 78 S. Ct. 240 (December 16, 1957). It holds that a Los Angeles municipal ordinance making it the duty of a convicted felon remaining in a city five days, to register with the police, violates due process without proof the accused knew or probably knew of such duty. The dissenting opinion mentions the serious possible impairment of a great number of similar ordinances and statutes in various parts of the country that have been in effect, some for many years.

Keco Industries, Inc. v. *C. & S. Bell Tel. Co.*, 166 Ohio St. 254 (March 27, 1957), decided that, under the Ohio statutes no cause of action was authorized for restitution of wrongly collected partially unreasonable and unlawful telephone charges based on rates which had been filed with and established by order of the Public Utilities Commission. An appeal to the U. S. Supreme Court on the ground that these statutes, thus conclusively interpreted by the court, were unconstitutional as a permission to take property without due process of law, was dismissed, 355 U.S. 182, 78 S. Ct. 267 (December 9, 1957).

Staub v. *City of Baxley*, 355 U.S. 313, 78 S. Ct. 277 (January 13, 1958), 26 U. S. Law Week 4079, held, with two justices dissenting, unconstitutional on its face a municipal prohibition against soliciting members for any dues collecting organization, union or society without a permit the mayor could grant or deny after considering the organization's nature and its effect upon general welfare; and neither the state court's having ruled the union organizer's failure to request a permit or the absence of attack by her on specific sections were adequate non-federal grounds to deprive the Supreme Court of jurisdiction.

Space limitations in a book "the municipal law counsellor will want to keep on his desk at arm's reach" have resulted frequently in rather summary and categorical statements of law. Regarding some of these, however, there may be uncertainty or conflict of opinion.[6] One cannot help but wish it could have been possible to include more citation of books and law review articles, almost entirely absent, save for A.L.R. and A.L.R. 2d references. Such often serve as a kind of devil's advocate to give counter arguments to positive statements of law.[7]

It is not to be supposed that any book can deal with all the multiple problems of municipal law. So, there may be unfairness in wishing that this vade mecum had included more of such and had dealt in fuller detail with others that have occurred to the reader. For instance, the book states (page 263) that the competitive bidding requirement is not violated where the municipality requires a product which is the subject of a monopoly, such as a patented article or one bearing a particular brand. There is no reference to statutes like Ohio R. C. 715.68, forbidding exclusive use of a patented article; nor to how that prohibition is sometimes overcome by asking for alternative bids, or by requiring the

6. Thus an argument could be made for qualification, as too liberal, of the author's statement under §4-7, "Municipal Powers—Inherent, Express, Implied, Essential and Necessary," pages 70-71. Seasongood, 2 JOUR. LEGAL ED., 244, 248-9 (1949). The example (page 71, note 7) that express power to own a utility system includes implied power to sell fixtures, does not mention contra cases, such as *Adie* v. *Mayor of Holyoke*, 303 Mass. 295, 21 N.E. 2d 377 (1939).

7. E.g., *Housing Codes and Urban Renewals*, Guandolo, 25 GEOR. WASH. L. REV. 1 (October, 1956) (Appendix A gives citations and decisions, and Appendix B some state statutes pertaining to housing regulations). Shamelessly throwing modesty aside, Seasongood, *Objections to the Governmental or Proprietary Test*, 22 VA. L. REV. 910 (1936), has considerable factual material as well as discussion. So have his *Cincinnati and Home Rule*, 9 OHIO ST. L. JOUR., 98 (Winter, 1958) and *The Merit System—An Essential of Good Government*, 8 VANDERBILT L. REV., 838 (June, 1955).

owner of a patent or trademark wanting to bid, to make the monopoly product available to all bidders on reasonable terms.[8]

The editors of this JOURNAL have subtly conveyed to their invitee that his review should not be so long as the book. Hence, this critique will come to an end with an expression of gratitude to the author for having given to the profession so fine a working tool, and hope that Mr. Rhyne will do the impossible (as he has done before) and magically create time to put out supplements containing some of the inclusions that have been suggested. Thereby he will preserve and widen the usefulness of a notable aid to those concerned with the law relating to municipal corporations.

MURRAY SEASONGOOD
Cincinnati, Ohio

THE CAPITALISTIC MANIFESTO.

By Louis Kelso and Mortimer J. Adler. New York: Random House. 1958. $3.75. Pages 265.

This book is important not so much because of its central thesis as because it offers a new way of thinking about the underlying perplexities of our contemporary industrial society. It offers a new idea when new ideas are badly needed as the old politico-economic platitudes of both left and right and especially of the middle are losing their meaning even to those who continue to mumble them. The central thesis of the book that the ownership of capital goods should be widely diffused is not new. John Adams stated it for the agrarian economy of his time (1776):

> The only possible way, then, of preserving the balance of power on the side of equal liberty and public virtue is to make the acquisition of land easy to every member of society; to make a division of land into small quantities, so that the multitude may be possessed of landed estates.

To Adams may be added a score of commentators as diverse as Hilaire Belloc, Walter Lippmann, Henry Simons, Frederich Hayek and Jacques Maritain. The less objective exhortation of Messrs. Merrill Lynch, Pierce, Fenner & Smith urging stock ownership by the so-called "little man" might be added to the list. Still, the characteristic mood of these commentators has usually been a wistful contrary-to-fact subjunctive—as though it would be nice if only it could be so.

Kelso and Adler present a tightly reasoned and persuasive argument that it *must* be so; that the only alternative is socialism; and, indeed, that we are already far down that road. The argument has many threads, but its central strand runs as follows: It is the development of machinery which has multiplied economic output. The worker of today contributes less (in energy and skill) than the worker of a century ago. Since it is the machine, not the worker, which increases productivity, it follows that it is the machine owner, *i.e.*, the capitalist, not the worker, who in strict justice is entitled to the proportionate increase in return. To force the property owner to share what is rightfully his is a derogation of property rights, and is unjust. Yet a just distribution of economic proceeds would leave workers so little as to render the economy not viable for lack of adequate markets or mass purchasing power. In consequence and partly from sheer expediency, the capitalist has been forced (by labor unions with government backing) to share his proper proceeds with workers. This is a "laboristic" distribution of wealth, and its end, as property rights become increasingly exercised by the state, is socialism. The cause, say the authors, is not inherent in private property, as proposed by Marx, but lies in too narrow a distribution of capital ownership. The remedy is not in the abolition of productive private property, which is communism, nor in gradual governmental arrogation of the normal attributes of property, which we see around us as "creeping socialism", but rather in a sufficiently broad citizen ownership of capital to make this kind of governmental regulation unnecessary.

To be sure, the argument, which comprises two thirds of the book, has its weaker moments as well as its stronger. But it must at least be read in its entirety before it is dismissed for some flaw or omission in this nine-sentence summary.

There will be some lawyers at least who will find the argument refreshing because its central term is justice. Indeed, though the book does not directly make the assertion, it is quite possible that the sense of confusion of legal practitioners in viewing today's socio-economic regulation may stem from the difficulty in finding in it this old-fashioned concept. If Kelso and Adler are right that today's economic regulation is impelled by expediency resting upon an inherent underlying injustice, it is not surprising that it becomes a shifting tatterdemalion of legislative, administrative and judicial adjustments to a flux of economic pressures.

The authors argue that the diffusion of capital ownership is essential to make justice compatible with a viable economy. Beyond this, they assert that capital ownership is the economic counterpart of political enfranchisement and that until property ownership is as wide as political citizenship a good society is unattainable. In its place, the only alternative is socialism.

The closing chapters of the book propose specific measures, mostly tax changes, to facilitate the broadening of capital ownership. To examine them in the detail required for intelligent evaluation is obviously beyond the scope of any brief review. What they symbolize, however, is the opportunity for constructive, concrete alternatives to more of the same patchwork characterizing current national economic policy.

This book has been called "provocative" in the same way, and perhaps for the same reasons, that new musical art-

8. A few only, at random, of other topics it would have been fine if the book had dealt with or treated more fully are: recoveries under void contracts, such as by restitution, replevin, trover, rental value; more about municipal utility rate regulation and fixing rate base by the archaic formula of reproduction cost less depreciation (*State* v. *Public Service Commission*, (Mo.) 26 L.W. 2322 (January 7, 1958, issue)). Seasongood, "Those Old Age Rate Cases", 15 PUBLIC UTILITIES FORTNIGHTLY 702 (June 6, 1935; is there any constitutional justification for special privileges to police and firemen not granted to other civil service employees such as by R.C. Ohio Sec. 143.27 allowing appeals to the courts, sometimes even on law and fact, from dismissals sustained by the Civil Service Commission (cf. *Schultz* v. *City of Philadelphia*, 385 Pa. 79, 122 A. 2d 279 (1956)); remedies, if any, of a property owner deprived of full use of his property by the caveat of a resolution of intention to condemn, not proceeded with for a long period; late statutes, adding, to the more recent decisions, recognition of aesthetics as a proper subject of legal protection.

ists are sometimes called "interesting". Both words are safe hedges against the ultimate verdict of later judgment. But the book is more than provocative.

For the lawyer who is content with old slogans, this book will be of little interest. But for those who hold to any part of the tradition of the Bar for a share of responsibility in understanding and in helping to resolve society's perplexing problems, this book must have a high place on the reading list.

LYNN A. WILLIAMS

Chicago, Illinois

NINTH TAX INSTITUTE: MAJOR TAX PLANNING FOR 1957. UNIVERSITY OF SOUTHERN CALIFORNIA SCHOOL OF LAW. *Edited by John W. Ervin. Albany, New York: Matthew Bender & Company. $14.50. 1957. Page 871.*

This volume contains the twenty-nine papers prepared for the Ninth Annual Tax Institute of the University of Southern California School of Law. Although that Institute is held in Los Angeles, its lecturers, who are the authors of this book, are drawn from all parts of the country.

Last year's volume emphasized actual forms and clauses for legal documents involving tax problems, especially in the fields of trusts and partnerships. That approach as an educational tool is undoubtedly a stimulating one, but is also a most difficult one with which to develop a subject with satisfactory completeness. This year's volume contains only vestiges of that theme, for the emphasis has been placed on "careful analysis of the law and Regulations" with respect to current tax planning for corporations, partnerships and trusts. It does seem, however, that the Institute may have concluded that detailed presentation of complicated subject matter can be most readily handled by the customary form of present legal articles. At least, the authors themselves probably find that form more familiar and possibly more congenial. And so, in spite of some excursions into specific examples, problem cases and forms, the papers bear resemblance, in method of presentation, to publications of other Institutes. It would seem worthwhile, nevertheless, to attempt the development of graduate or postgraduate tax courses relying basically for their teaching method upon the presentation of actual problems whose solutions must be reflected in the drafting of legal documents. Probably, such courses, which some law schools are now at least partially developing, must be the products of groups of both teachers and practitioners, working together over a considerable period perhaps with the financial assistance of a foundation grant. It is to be hoped that the Institute will again try that tack in earnest.

The papers in this book are, as usual, of very high quality. Several are of especial interest. The papers "New Partnership Regulations" by Donald McDonald and "New Trust Regulations" by Julius M. Greisman not only are thorough and workmanlike discussions of difficult subjects, but also reflect the experience of the authors in the actual drafting of these regulations while they were members of the Legal Advisory Staff of the Treasury Department. Ralph S. Rice's paper points out the problems in applying attribution rules under Section 318 in connection with stock redemptions. A particularly valuable consideration of when a partnership may be taxed as an "association" appears in John O. Paulston's "Use of Limited Partnerships in Tax Planning". Leonard Cohen gives wise words of advice on the use of non-commercial annuities in "Acquisition of Surviving Spouse's Interest in an Estate". The frequently overlooked tax problems in a real estate escrow agreement are considered in an article by Martin S. Stolzoff. An authoritative description of the function and operation of the Tax Court of the United States is presented in the paper by Judge Arnold Raum of that court. His statement as to the Tax Court's disregard of memorandum decisions as precedents almost persuades me to give up reading them!

Special mention should also be made of the article by Thomas N. Tarleau, "The Role of Corporate Minutes in Taxation". This subject, which is seldom discussed, definitely needs to be thoroughly studied by tax practitioners and corporate lawyers. The lack of discussion probably indicates serious gaps in our knowledge as to requirements for keeping corporate minutes, the objectives in drafting minutes and their use in litigation. This article gives welcome light and leads on these practical problems and is recommended to all lawyers, especially those who are counsel for medium-sized and small corporations.

The book begins fittingly with a memorial tribute to the late Randolph Paul, of whom John Lord O'Brian said, "In my opinion, the country never had a more intelligent, forthright and altogether dedicated public servant". Randolph Paul's writings and personality stimulated tax lawyers, nationwide and at the Southern California Tax Institute, to recognize their public responsibilities and to perfect their craft. He was a leader in establishing the dignity and worth of practice in the tax field. The moving speech of Lloyd K. Garrison at Randolph Paul's memorial services is generously quoted, and we can thank the Institute for preserving important parts of it in print.

HARRY K. MANSFIELD

Boston, Massachusetts

WILLIAM NELSON CROMWELL, 1854-1948, AN AMERICAN PIONEER IN CORPORATION, COMPARATIVE AND INTERNATIONAL LAW. *By Arthur H. Dean. Privately Printed. 1957. Pages 237.*

This is a fascinating account of one of the New York Bar's acknowledged leaders, of the firm he founded and of many of the outstanding cases he and it participated in over the years.

There is a foreword by John Foster Dulles (a former member of the firm), which points up the significance of the volume in telling how an individual law practice can grow into a great and useful institution "and make a positive contribution to the law".

Cromwell was born in Brooklyn in 1854 and died at the age of ninety-four. His life thus spanned an active period in the industrial growth of our country and in the expansion of legal facilities afforded industry particularly by the big firms that grew with the coun-

try and aided in the expansion of commerce and industry. All of this is well told and well documented by Arthur H. Dean, the present senior partner of the firm.

We are afforded a peek into the quaint Wall Street quarters of the young firm and into the complexities of its increasing activities in and out of the law. "Cromwell lived a full life as a lawyer, governmental, business and personal adviser, trustee and philanthropist . . . " all of which was characterized by "his flair for figures, passion for facts and more facts, and insistence on realistic, economic analysis rather than polished rhetoric, literary allusion or poetical quotation".

Of particular interest for those in the field of corporate finance is the recital of the development of the use of the open end mortgage with no fixed limitation of the aggregate of bonds to be issued thereunder and secured thereby. Cromwell and his associates were pioneers in the establishment of this highly successful form of financing.

The Cromwell plan for trusteeing assets and claims against a debtor with a view to an amicable adjustment without stoppage of business was an ingenious device that made a deep impress upon the later modifications of the Bankruptcy Act through the introduction therein of the concept of debtor in possession and of reorganization and arrangement proceedings.

The subject's widespread interest in international finance and international affairs served to place him within the stream of history making in his day. Of great concern is the story of the so frequently misrepresented part Cromwell played in the Panama Canal acquisition by the United States.

The extent of Cromwell's bounty in his bequests to bar associations, including the American Bar Association, universities and law schools is a familiar story, worthy of the detailed repetition here given.

Not the least important part of the story told in this volume is the account of famous cases in which Cromwell and his firm participated. Of equal interest are the facts about those who aided him, including, to mention but a few of the noteworthy past and present partners of Sullivan & Cromwell: Harlan F. Stone, John Foster Dulles, Eustace Seligman, Edward H. Green, Allen W. Dulles, David W. Peck and the author, Arthur H. Dean.

Pictures of some of the leading partners are included in the book along with a facsimile of the original partnership agreement between Algernon Sullivan and William Cromwell, dated April 2, 1879, under which the former was to receive two thirds, with his compensation as public administrator excluded from the partnership account.

LESTER E. DENONN
New York, New York

AN INTRODUCTION TO INTERNATIONAL LAW. *By Wesley L. Gould. New York: Harper & Brothers. $7.50. 1957. Pages 809.*

Practitioners will find this introduction a useful research tool, although it was not designed primarily for them. It is a textbook to introduce political science skeptics to a subject at which they usually scoff. For lawyers conversant with the growth of the common law, international law need be no mystery. If looked upon as a body of customary rules, often ignored but more often accepted because they make international intercourse tolerable, the subject called international law requires little justification. Professor Gould lets his students draw their own philosophical conclusions as to whether the subject can properly be called "law". He merely recounts what has been going on. This is what makes the book attractive to the practitioner.

Myriad footnotes and a first class bibliography arranged by subject matter make this volume a useful addition to a law library, even for the man who meets a problem of international law only occasionally. For the old hand, as well, the book has the advantage of bringing him up to date so that he need not fear that his opponent will make him look like a fool. Appendices make convenient the United Nations Charter and Uniting for Peace Resolution, as well as the Statute and Rules of the International Court of Justice.

Gould says that he has explored the major libraries of the United States and Europe for his materials, and the text shows the result. Notable is the chapter on war crimes which treats this new subject with reference to the many unknown minor cases which followed the historic Nuremberg and Tokyo trials of the major offenders. Here is law in the making, just as it is to be found in the ancient English reports as common law crime was evolving. Another almost new area is that treating personnel of the United Nations. While going much less far than the extraordinary treatment of law relevant to contracts and torts of the Secretary General in Philip C. Jessup's recent *Transnational Law* (Yale University Press, 1957), it provides a suggestion of an area which is already becoming an item in the practice of some New York lawyers.

Being a political scientist Gould naturally gives attention to the aspect of power and politics which is intriguing even the law professors, led by Myres S. McDougal of Yale. England's dominant role during the nineteenth century in establishing many of the present accepted rules is analyzed, as is the role of the United States in the twentieth century. Gould reports, as well as it has been done in any general volume, the Soviet challenge to principles accepted by the West and he provides full reference to literature in Western languages on the subject. He cautions the reader against the naked power approach in these times, saying that a powerful state which finds it necessary to work in coalition must not attempt to force its way by power alone. He urges that power be employed by the United States "with a care for the interests of potential allies in order that it may in their eyes appear as in part the force of justice".

In this suggestion Gould shows that he senses the craving for legality which is to be found today in many parts of the world. No great power is sufficiently strong to force its way upon states beyond its immediate belt of influence. The so-called "uncommitted countries" seem to swing irrationally from one pole to the other, although they may seem rational to themselves because they think that

one side or the other has taken a just position. This being so, even the skeptic should find a place for international law in his arsenal, for adherence to its principles can win friends.

For the believer in international law as a set of principles gaining force from some higher law a consideration of its principles in formulating national policy will require no such cynical justification. Whichever one's personal view of the subject, the case seems strong today for careful consideration by Western policy makers of the law of a matter before establishing a position. Gould's book will provide a little handbook, consequently, not only for the lawyer seeking to develop a point in a brief, but also for a lawyer-statesman who wants to know more of this weapon of justice, which is playing a significant part in the battle for men's minds on the international stage.

JOHN N. HAZARD
New York, New York

HANDBOOK OF PARTNERSHIP TAXATION. *By Arthur B. Willis, Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1957. $15.00. Pages 585.*

The publication of such a book is a pleasant and rare occasion. Mr. Willis' new work combines the features of a convenient guide for the practitioner in his day-to-day partnership law work with a penetrating and masterful analysis of the partnership tax problems under Subchapter K of the 1954 Internal Revenue Code. The text will probably serve as a guide for the courts, Treasury Department officials and private practitioners in the interpretation of the partnership tax provisions for the coming years.

Few men are as qualified as Mr. Willis to write this book, and most of them have worked closely with him over the years as advisers on partnership tax legislative matters. For the past three years Mr. Willis has served as Chairman of the Partnership Committee, Section of Taxation, American Bar Association. Prior to that time he was one of the advisers to the congressional and Treasury staffs in the drafting of Subchapter K. He is now Chairman of the Advisory Committee on Subchapter K formed to assist the House Ways and Means Committee of the 85th Congress.

Mr. Willis discusses the general tax concepts of partnerships and then goes directly to each phase of a partnership's life. His work, in parts II to VII, covers the formation of the partnership and the contribution to capital, the problems of the operating partnership, the sale or exchange of a partnership interest, distributions of partnership property, death and retirement of partners and miscellaneous matters not properly includible elsewhere. A total of thirty-one separate chapters within the categories noted above enables a reader to locate quickly the analysis of any particular aspect of partnership taxation. For example, the chapter on the partnership agreement, of special interest to attorneys, explains the significance of a written partnership agreement under Subchapter K. It contains practical suggestions for items to be included in the agreement and the methods of amending the partnership agreement.

The book also contains an extended and detailed discussion of buy-and-sell agreements and family partnerships.

A unique aspect of the book is the incorporation of Mr. Willis' own tax suggestions in actual partnership provisions compiled at great personal effort from contributing attorneys across the country. There is a model partnership agreement for partnerships engaged in commercial or industrial operations, another for family partnerships, and a third for professional partnerships. A series of alternative provisions are provided for special situations not falling within the general rules. Supplementing these forms is a detailed explanation of each provision to apprise the practitioner of the reasons for the provision. The book thus makes available to the practicing lawyer, in usable form, the product of years of research and practical experience in the partnership field.

The lasting value of the book, however, is in its clear exposition and interpretation of the provisions of Subchapter K. Mr. Willis sets forth in simple language the basic concepts of the partnership provisions and their interrelationships. He makes extensive use of examples to show the actual operation of these provisions. In the partnership area, where there are many elements to be taken into account in a given situation, this is the only feasible method of explaining the problems.

Mr. Willis does not hesitate to deal with some of the more controversial problems of partnership taxation. For example, he recommends that the law be amended to allow specifically the deduction of costs of organizing a partnership. He likewise discusses the arguments pro and con as to the validity of the Treasury Department's regulations which tax a service partner on the receipt of a capital interest for services, and concludes, as a critic, that the Treasury has a sound basis for the regulations. Certain procedures are then outlined by the author to minimize the impact of the regulations.

With respect to the new rules for the allocation of income and deductions among partners, Mr. Willis provides a detailed explanation of the flexibility provided under the new rules. However, he includes a cautionary note that unrealistic allocations may fail to meet the requirements of the statute. Here, as elsewhere, he points up the limitations of Subchapter K and indicates the areas of possible legislative change.

The handbook establishes a high standard of tax writing. It is a book of immense practical value which at the same time reflects intelligent and responsible interpretation of the tax provisions. Mr. Willis has made an excellent contribution to the understanding of our tax laws.

JOSEPH P. DRISCOLL
Dallas, Texas

WALTER A. SLOWINSKI
Washington, D. C.

THE LABOR POLICY OF THE FREE SOCIETY. *By Sylvester Petro. New York: The Ronald Press Company. 1957. $5.00. Pages 339.*

Professor Petro's new book is a provocative one. According to Professor Wolman, Professor of Economics at

Columbia University, it is "an excellent book—literate, well informed, calm and dispassionate. The author shows unusual competence and insight and a very clear understanding of what is wrong in the evolution of our labor law and how things can be put on the right track".

Many business leaders will agree with the above and applaud the book because it crystallizes their criticisms of labor unions. Divided into three major sections entitled "Free Society", "The Evolution of Labor Law and Policy in the United States", and "A Labor Policy for the United States", the book deals with modern institutions and our free society. Relying heavily on the writings of von Mises in economics and Professor Crosskey in law (to whom the book is dedicated), and on his own voluminous writings on labor relations law in the *Labor Law Journal*, the author deals with a wide range of topics including economics, political science, tax policies, inflation, constitutional law, property and contract rights, and labor relations law. These are covered in nineteen chapters with 289 pages, and 477 footnotes covering thirty-seven pages.

I shall leave to political scientists and economists the task of pointing out the differences between the realities of our modern economy and the theoretical free competitive society of Petro. In one important instance, however, Petro seems to recognize realities, for he finds a place for trade unions and collective bargaining among our free institutions. At the same time, the author's aim to free the market from any interference is beset with inconsistencies, for by definition collective bargaining and trade unionism with the peaceful strike (permitted by Petro) involve definite interferences with his theoretical free market. In another instance involving the present realities of inflation in our economy, Professor Petro's basic argument neglects the problem of the business cycle analyzed in the recent detailed writings of Professor Sumner Slichter who deals more realistically with our present inflationary problem. (See especially, "Thinking Ahead on the Side of Inflation"—*Harvard Business Review*, September-October, 1957, pages 15-22).

In the field of law, the basic assumptions of Professor Crosskey's book which permeate the present book have already been criticized by such scholars as Professor Ernest J. Brown and Professor Henry M. Hart, who reviewed the book in 67 *Harvard Law Review*, 1439 to 1486 (1954). In the field of labor relations law, Professor Petro's previous writings which are incorporated in this book have already been criticized directly or indirectly by such observers as Kamin, "The Fiction of Labor Monopoly", 38 A.B.A.J. 748 (1952); Brown, "Needed—A New Start on National Labor Relations Law", 4 CCH *Labor Law Journal* (February, 1953) 71; Gilbert, "The Capital Service 'Saga'—Fact or Fiction", 4 CCH *Labor Law Journal* (October, 1953) 659; Forkosch, "Informational, Representational and Organizational Picketing", 6 CCH *Labor Law Journal* (December, 1953) 843; and Cox, "Some Aspects of the Labor Management Relations Act", 61 *Harv. L. Rev.* (November, 1947) 1, (1948) 274, and "Federalism in the Law of Labor Relations", 67 *Harv. L. Rev.* 1297 (1954).

In his "new" analysis of the common law dealing with labor, Professor Petro claims that judges properly applied the principles of the free market protecting the rights of workers and employers and did not apply the criminal conspiracy doctrine to labor unions. Furthermore, he criticizes the examples and conclusions of the historic book, *The Labor Injunction*, by Frankfurter and Greene and claims that they misinterpreted the court decisions when they stated that injunctions restrained "strike activities" as if strikes rather than coercive conduct were being enjoined. To this reviewer, Professor Petro's analysis does not bear up under scrutiny. Many of the state courts enjoined all peaceful picketing based on what Justice Holmes called "economic predilections of the judges". Even after *Commonwealth* v. *Hunt*, 4 Metc. 111 (1842, Mass.), there were ten cases between 1842 and 1880, according to Professor Witte in 35 *Yale L. J.*, using the criminal conspiracy doctrine to prevent laborers from peacefully organizing as in *State* v. *Donaldson*, 32 N.J.L. 151 (1867). The Massachusetts court, which is praised by Petro, enjoined all *peaceful* picketing in such cases as *Vegelahn* v. *Guntner*, 167 Mass. 92 (1896); *Folsom Engraving Co.* v. *McNeil*, 235 Mass. 269 (strike for arbitration); *United Shoe Machinery Corp.* v. *Fitzgerald*, 237 Mass. 537 (strike to induce an employer to bargain collectively); and *Quinton's Market, Inc.* v. *Patterson*, 303 Mass. 315 (strike for organization). Furthermore, the abuse of the injunctions in labor relations in recent years is well described in the *Report* of the U.S. Senate Subcommittee on Labor-Management Relations of the Committee on Labor and Public Welfare, "State Court Injunctions" (1951).

In his recommendation for the theoretical free society and as a major thesis of the labor relations section, Professor Petro attacks coercion by unions, which he claims "are the greatest threat to personal freedom at the moment". In particular he condemns all union security clauses as coercive and defends right-to-work laws. He overlooks the fact that the right-to-work laws do not mean the acquisition of a right to a job which no government could effectuate in a competitive economy but the prohibition of the free right of management and labor in free collective bargaining to enter into a voluntary contract which requires membership in a labor union after thirty days in accordance with the will of the majority of employees in the plant as evidenced by the NLRB union shop elections. For example, in the secret ballot elections conducted by the NLRB from 1947 to 1951, of 46,119 elections held 97 per cent of the 6,542,000 employees covered voted for union-security provisions.

By his insistence and emphasis on employees' free choice, Professor Petro fails to recognize that labor unions are the employees, for he treats them as outsiders with whom management must continually compete for the employees' support. His recommendations to allow employers to offer benefits directly to employees during an organizational drive is a form of coercion and will

increase bitter conflict over organization and recognition rather than promote industrial peace. His proposal for increased fractional representation would further complicate and impede collective bargaining and produce battles for survival. The suggestion for an extension of Section 9(a) of the Labor-Management Relations Law relative to processing of individual grievances would produce more confusion in the labor picture, further discourage union responsibility and promote unrest and open conflict. It is this brand of philosophy in the Taft-Hartley Law which is well criticized by Professor Cox in 61 *Harv. L. Rev.* 274 (1948).

Petro's other proposals for a national labor policy are also open to serious question. His prohibition of all secondary boycotts fails to recognize the distinction between "neutral" and "interested" employers. His "cooling off" period for emergency disputes is not only a form of intervention in the free collective bargaining process which he supports but of doubtful effect in practice. His limitation on "good faith bargaining" to the requirement of a meeting would simplify the present law but would not promote true collective bargaining. By his basic recommendations for the repeal of the Norris-La Guardia Act and the elimination of the NLRB, Professor Petro is in effect suggesting a return to jungle warfare, labor relations by injunctions including ex parte restraining orders, and resort to direct action in forty-eight overcrowded state courts and all the federal courts rather than reliance on a single expert administrative agency. The practicing lawyer in the dynamic and fluid field of labor law would certainly take issue with Professor Petro's claim that a "detailed coherent code of substantive law for labor relations exists already" and that the state courts can easily apply this "detailed coherent code".

Although today there are many problems in the complex labor relations field including the recently publicized abuses in health and welfare plans, lack of democracy in some unions, isolated cases of corruption, coercion and violence, "big business tieups", lack of interest by members in the internal affairs of their unions, inadequate penalties against employers for violations of Section 8 (a)(5) of the Taft-Hartley Law, and the "political" administration of the NLRA, the practical solutions for these and other difficult problems raised by Professor Petro are not found in his provocative book.

ROBERT M. SEGAL
Boston, Massachusetts

IDEAS, INVENTIONS AND PATENTS. *By Robert A. Buckles. New York: John Wiley & Sons, Inc. 1957. $6.00. Pages 270.*

This book advises that it is addressed to engineers and scientists engaged in research work and to businessmen directing enterprises in which industrial and intellectual property plays a significant part. It purports to instruct them in respect of what they should know about patents, trademarks, copyrights, unfair trade practices, violations of confidential disclosure, trade secrets and unfair competition. This is a large but unfilled order.

As an authoritative reference work on the above listed subjects, the book has no substantial value. This arises in large part from the fact that the subjects treated are in no case accurately defined or philosophically analyzed or exhaustively considered. They are introduced to the reader, but their acquaintance is not made.

Like other works purporting to give a simplified explanation of an abstruse and difficult subject, this work is neither accurate nor thorough nor definitive. But apparently that is not its real aim. This book would appear to have value to those to whom it is addressed in the following respects:

Very frequently, scientists, research workers and inventors, as well as businessmen and even lawyers having no specialized training in the subject find it necessary to become interested in patents, trademarks and copyrights or related subjects (industrial and intellectual property). When they are first called upon to consult the patent agent or patent lawyer, they find themselves caught flat-footed, confronted with a patent lawyer's jargon relating to concepts with which they are not familiar. As a consequence, they are generally the victims of a feeling of inferiority which the patent lawyer takes no pains to remove or even to abate. They find themselves unable to take part in the conversation.

This little book, with all its faults—and they are many—will serve to reduce that feeling of inferiority from which they suffer who unavoidably collide with situations requiring some familiarity with the subject. A number of specific situations or specific instances of the type encountered by house patent counsel are included, apparently more to impart vocabulary than to illustrate principles. Thus the book gives an example of how an application for patent is processed through the Patent Office. Facsimiles of actual papers acquaint the reader with the appearance of papers which he will be called upon to deal with. The appended glossary, though quite unsatisfactory from the standpoint of accuracy, gives the reader some idea of the meaning of the specialized terms which are employed in this line of activity.

As a means to give the uninitiated a vocabulary and some specific information and examples relating to situations commonly encountered, this book is capable of rendering a useful service.

JOHN A. DIENNER
Chicago, Illinois

What's New in the Law

The current product of courts, departments and agencies

George Rossman · EDITOR-IN-CHARGE

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Civil Procedure . . . *insurance discovery*

Contrary to the recent decision of the Supreme Court of Illinois in *Illinois ex rel. Terry* v. *Fisher*, 145 N.E. 2d 588 (44 A.B.A.J. 63; January, 1958), the Supreme Court of Florida has decided that pretrial discovery rules cannot be used by a plaintiff to ascertain the limits of a defendant's liability insurance.

The Florida civil procedure rule involved does not require a showing of good cause for taking a pretrial deposition and provides that the "deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party, or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things. . . ." It also provides that the matter need not be admissible itself, if it is "reasonably calculated" to lead to admissible evidence. In the instant case the defendant had admitted that he was insured but had refused to state the policy limits.

Observing that the purposes of the judicial system in a tort case is to provide a forum for the proof of liability and the fixing of damages, the Court declared that "the limits of insurance carried by a defendant . . . are not relevant" to either of these purposes. The Court said that the pretrial discovery rule was applicable only "to the proof or the defense of an action" and that insurance limits are immaterial to either.

To interpret the rule otherwise, the Court continued, would give one party the strategic advantage of having information that has nothing to do with the merits of the action. Rules of procedure should not be used to alter substantive rights, it said.

One judge dissented with the observation that the "administration of justice should not be a game of hide-and-seek". He thought that discovery of liability insurance limits would fulfil the declared purpose of the procedure rules "to secure the just, speedy and inexpensive determination of every action".

(*Brooks* v. *Owens*, Supreme Court of Florida, October 25, 1957, O'Connell, J., 97 So. 2d 693.)

Criminal Law . . . *flags and pre-emption*

Counsel for three men connected with a magazine called *Modern Man* have lost an argument with the Supreme Court of Illinois that the doctrine of federal pre-emption applies to the field of legislation dealing with desecration of the United States flag, but, as the case turned out, the scholarship and argument were not necessary.

The defendants had been convicted of violating an Illinois statute making public desecration of the United States flag a misdemeanor. Their offense was the publication of a photograph described cryptically by the Court:

> . . . One of the illustrations . . . depicted a young woman who was nude except for a large hat, sun glasses and a piece of cloth which covered the pubic area of her body. This piece of cloth, though the defendants question the fact, looks exactly like the flag of the United States.

The Court dismissed the defendants' contention that, under the federal pre-emption doctrine of *Pennsylvania* v. *Nelson*, 350 U.S. 497, Illinois is without power to use its desecration-of-the-flag statute, holding that the federal statute does not deprive a state of the power to regulate the conduct of its citizens toward the American flag, when such conduct is likely to produce a breach of the peace within its borders. However, the Court reversed the convictions, finding "the record devoid of any evidence showing or tending to show that the publication of the picture by the defendants was done under such circumstances and was of such a nature likely to bring about the substantive evils the legislature sought to prevent".

(*Illinois* v. *Von Rosen*, Supreme Court of Illinois, January 24, 1958, House, J., 147 N.E. 2d 327.)

Divorce . . . *jurisdictional base*

The concept that domicile is the only jurisdictional base for divorce is not entitled to constitutional sanctity. So saying, the Supreme Court of New Mexico has affirmed the right of that state's district courts to grant divorces under a servicemen's statute which requires only a year's presence within the state.

The New Mexico divorce act calls for one year's actual residence, in good faith, but provides that servicemen "continuously stationed in any military base or installation in the State of New Mexico for such period of one year shall for the purposes hereof, be deemed residents in good faith. . . ." In *Crownover* v. *Crownover*, 274 P. 2d 127 (40 A.B.A.J. 1088; December, 1954), the New Mexico Court ruled that continuous station in the state for one year raised a conclusive presumption of domicile. Now the Court has gone the next step and has said that "it is within the power of the legislature to establish reasonable bases of [divorce] jurisdiction other than domicile".

The Court could find no pronouncement of the United States Supreme Court that domicile is the sole jurisdictional peg for divorce suits. To abandon the "subjective intent element inherent in the doctrine of domicile does not violate any fundamental right em-

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Editor's Note: Virtually all the material mentioned in the above digests appears in the publications of the West Publishing Company or in The United States Law Week.

bodied in the due process clause", it concluded. Admitting that domicile is in fact the almost-universal basis for divorce jurisdiction, the Court declared that it is wrong to say that no other relation may arise between a state and individual to create a sufficient interest in the state to give it power to grant divorce decrees.

At pains to point out that the statute was not an attempt to convert divorce into a transitory action or to make New Mexico a mecca for the divorce-shopper, the Court said that New Mexico had a substantial interest in the domestic relations of service families that had resided there a year—a more intimate connection "than the 'six-weeks divorce' states ever achieve with most of their alleged domiciliaries". Concluded the Court:

> The traditional domiciliary requirement is designed to prevent divorce-minded couples from shopping for favorable residence requirements. The concept of domicile has been notably unsuccessful in achieving this goal. The result is more nearly reached under a statute, such as the one in question, which in effect grounds jurisdiction on the strength of the facts connecting the parties to the state of the forum.

(*Wallace* v. *Wallace*, Supreme Court of New Mexico, January 23, 1958, Lujan, J., 320 P. 2d 1020.)

Evidence . . .
dead-man's act

Calling the state's dead-man's statute "illogical, arbitrary and unjust", a New Jersey court has refused to apply it to a situation where one of the parties to a suit died during an adjournment of the trial.

During a two-week session, a plaintiff corporation had completed its case and the defense had opened, but the defendant had not testified. An adjournment was taken and before the trial resumed, the defendant died. His executors were substituted as defendants and they moved to strike the testimony of three witnesses who were officers of the plaintiff on the ground that they were incompetent under the dead-man's act, the action having become one against a decedent's estate.

The Superior Court of New Jersey, Chancery Division, Warren County, denied the motion. It ruled that the statute should be strictly construed, and, when so construed, it barred testimony only if the other party were dead at the time the testimony is offered. The act can have no retroactive effect, the Court said.

Additionally, the Court held that the act did not bar officers of a corporate party from testifying where the transaction is with the corporation, although plaintiff's counsel had conceded otherwise on this point.

(*Know the Facts, Inc.* v. *Ryan*, Superior Court of New Jersey, Chancery Division, Warren County, January 13, 1958, Sullivan, J., not reported.)

Military Law . . .
applicability to civilians

Holding that neither the *Toth* nor *Covert* case determines the point, the United States District Court for the District of Columbia has refused to rule unconstitutional a provision of the Uniform Code of Military Justice subjecting civilians employed overseas by the Armed Forces to court-martial jurisdiction.

In *U.S. ex rel. Toth* v. *Quarles*, 350 U.S. 11, the Supreme Court held that a discharged serviceman may not be tried by a court martial for an offense committed while in service. In *Reid* v. *Covert*, 354 U.S. 1, the Court ruled that dependents of servicemen, accompanying them overseas, are not subject to court-martial jurisdiction, at least in capital cases. In both instances the Court invalidated sub-sections of Article 2 of the Uniform Code, 10 U.S.C.A. §802, on which military trials had been based. The sub-section involved in the instant case was Article 2(11), which provides that "persons serving with, employed by, or accompanying the armed forces outside the United States" may be tried by military courts.

In holding Article 2(11) valid, the Court declared that the position of a civilian employee is different both in fact and principle from that of a former serviceman-turned-civilian or of servicemen's dependents. This was recognized, the Court pointed out, by the Supreme Court's opinion in *Covert*. Then too, the Court said, the constitutional language granting Congress the power to "make rules for the government and regulation of the land and naval forces" should be interpreted against the background of the framers' intention to bring about a strong and effective national government. Looking at history, the Court noted that from the time of the British Articles of War of 1765 to the present Uniform Code there has been a provision subjecting civilian employees to trial by courts martial.

The Court emphasized that the use of civilian employees is frequently indispensable to the operation of the Armed Forces. It declared that if they were not subject to court-martial jurisdiction when serving overseas, three alternatives would exist: establishment of federal civilian courts abroad, return of the offenders to the United States for trial, or cession of jurisdiction to foreign courts. None of these alternatives is practicable or desirable, the Court concluded.

(*U.S. ex rel. Guagliardo* v. *McElroy*, United States District Court, District of Columbia, January 13, 1958, Holtzoff, J.)

Sales . . .
warranties

The Supreme Court of Ohio has advanced into pioneer ground by holding that lack of privity does not prevent the ultimate consumer of a cosmetic from maintaining an action against the manufacturer for breach of an express warranty, but three judges have protested that the Court went further than necessary to dispose of the case.

The plaintiff's trouble was simple but serious: after using a home-permanent set according to the manufacturer's directions, her hair "fell off to within one-half inch of her scalp". Her complaint contained three counts: one based on negligence, one on express warranty and one on implied warranty. The negligence allegations were carried into the second and third counts, however, so that the complaint in effect charged that the warranties were negligently made. Only the manufacturer was named as defendant, and the trial court affirmed a demurrer to the warranty counts. The intermediate appellate court decided the plaintiff could proceed on her express-warranty count, and the manufacturer went up.

Confessing that the prevailing view is that privity of contract is essential

in an action based on breach of warranty, the Supreme Court noted that an exception has been carved out as to original-container foodstuffs and medicines, where a warranty of fitness for human consumption is said to carry over from manufacturer to ultimate user. "It would seem but logical", the Court declared, "to extend [that] rule to cosmetics and other preparations, which are sold in sealed packages and are designed for application to the bodies of humans and animals."

But the Court was not content to rest its conclusion on the enlargement of an exception. It held that it was a mistaken notion that the term "warranty" implies a contractual relationship. This idea, the Court said, was without historical foundation, for originally an action for breach of warranty was but an expansion of trespass on the case to include deceit, a remedy sounding in tort and requiring no privity.

Buttressing its position, the Court pointed out that manufacturers of brand-name, packaged cosmetics use advertising extensively in representing the worth, quality and benefits of their products to the consumer. "What sensible or sound reason then exists as to why, when the goods purchased by the ultimate consumer on the strength of such advertisements aimed squarely at him do not possess their described qualities and goodness and cause him harm, he should not be permitted to move against the manufacturer to recoup his loss?" the Court concluded.

Three judges concurred separately, believing that the count should stand because it alleged an action based on deceit, but remonstrating that the majority had unnecessarily based its "conclusion upon pronouncements of law which it expressly recognizes as being 'opposed to the present weight of authority,' as discarding 'legal concepts of the past' and as possibly conflicting 'with previous decisions of this Court' ".

(*Rogers* v. *Toni Home Permanent Company*, Supreme Court of Ohio, January 29, 1958, Zimmerman, J., 167 Ohio St. 244.)

Segregation . . . *certificates*

A Louisiana law requiring a special certificate for enrollment in college has been struck down by the Court of Appeals for the Fifth Circuit as unconstitutional.

The statute, enacted in 1956, requires a high school graduate seeking admission to a state-supported college to present a certificate of eligibility "addressed to the particular institution sought to be entered" and signed by the applicant's high school principal and parish superintendent of education.

The Court affirmed the district court's finding that the act was unconstitutional because it contained no standards or outline of qualifications as guidance to the grant or withholding of the certificates. "The very absence of such standards", the Court declared, "condemns the statute as providing, by clearest implication, as the only standard: that of whether a Negro student seeks a certificate to a Negro college or seeks one to a white college." To buttress this, the Court pointed in the record to two refusals of certificates based specifically on race.

The Court thought that additional light was thrown on the certificate law by a companion statute passed in 1956. This act denies teachers' tenure protection to any teacher (and, by application, any principal) found guilty of "advocating or in any manner bringing about integration of the races within the public school system or any public institution of higher learning of the State of Louisiana." The Court, holding that it was proper to consider the bearing of this statute on the certificate law, noted that the trial court had found that "not a single principal of a public school or superintendent of a public school system has signed a certificate for a Negro to go to a white school".

(*Board of Supervisors of Louisiana State University* v. *Ludley*, United States Court of Appeals, Fifth Circuit, February 13, 1958, Tuttle, J.)

A new twist in segregation cases has been advanced to but rejected by the Court of Appeals for the Fifth Circuit.

In a representative suit against it to enforce the right of Negroes to use New Orleans public recreational facilities on a non-segregated basis, the New Orleans City Park Improvement Association contended that since the Supreme Court's decision in the *School Segregation Cases*, 347 U.S. 483, was based on psychological considerations, that the trial court should have heard evidence to determine whether psychological factors are similarly present in the denial to Negroes of the non-segregated use of municipal recreational facilities.

But the Fifth Circuit would have none of this. It declared that the invalidity of segregation in public parks had been made clear by the Supreme Court in *Holmes* v. *City of Atlanta*, 350 U.S. 879, and *Mayor and Council of Baltimore City* v. *Dawson*, 350 U.S. 877, and that the basis of those decisions was now immaterial. "The courts have decided that the refusal of city and state officials to make publicly supported facilities available on a non-segregated basis to Negro citizens deprives them of equal protection under the laws in too many cases for us to take seriously a contention that such decisions are erroneous and should be reversed", the Court concluded.

(*New Orleans City Park Improvement Association* v. *Detiege*, United States Court of Appeals, Fifth Circuit, February 13, 1958, *per curiam*.)

Unfair Competition . . . *marshals and play suits*

It's quite possible that Wyatt Earp, although an actual historical-legendary figure, has acquired a secondary meaning through television, entitling those responsible for his resurrection to the fruits flowing from the magic of their handiwork. So possible, according to the United States District Court for the Southern District of New York, that it has granted a preliminary injunction to restrain an unlicensed manufacturer from marketing Wyatt Earp "official" play suits for children.

The defendant contended that there was no possibility of secondary meaning attaching to a non-fictional person, but the Court felt otherwise. "It is perhaps not too much to say", the Court remarked, "even at this preliminary stage of the proceedings, that the name of Wyatt Earp has been battered into the public consciousness by the television program to an extent far beyond any fame or notoriety ever previously

attached to the marshal's name." Noting the money invested in and returns received from the TV show, the Court concluded that the "finding is nearly inescapable that the commercial value now enjoyed by the name is attributable almost entirely to the program". The Court concluded that enough possibility of secondary meaning and consumer confusion existed to warrant a preliminary injunction.

Against an argument that the parties were not competitors, the Court pointed out that the owners of the Wyatt Earp show license manufacture of articles bearing his name and the likeness of Hugh O'Brian, who plays the marvelous marshal.

(*Wyatt Earp Enterprises, Inc.* v. *Sackman, Inc.*, United States District Court, Southern District of New York, January 10, 1958, Edelstein, J., 157 F. Supp. 621.)

United States . . . *veterans' preference*

An attack on the constitutionality of the Veterans Preference Act has been turned aside by the Court of Appeals for the District of Columbia Circuit, with one judge dissenting.

Against a contention that the Act interferes with the President's constitutional prerogative of hiring and firing employees of the executive branch of Government, the Court declared: "Veterans' preference in federal employment has been an established policy of Congress for many years. Encouragement and reward of military service are its rational basis. If it is unwise and costly, this does not make it unconstitutional. The Supreme Court and other courts have enforced it, and have done so without suggesting any possible constitutional difficulty."

If veterans' preference statutes are unconstitutional, the Court posited, so would be much civil service legislation. And even if the President were free to ignore veterans' preference regulations, the Court continued, he could yet comply with them, as he was doing in this case.

The dissenting judge, feeling a substantial constitutional question was raised, would have remanded to a three-judge district court. He said that the Act amounted to a "peremptory restriction" on the President's power and that for this reason it was quite different from civil service statutes, which he said are cast as an aid to the President and do not impinge his executive field.

(*White* v. *Gates, Jr.*, United States Court of Appeals, District of Columbia Circuit, January 23, 1958, Edgerton, J.)

Workmen's Compensation . . . *amputation and disability*

A Pennsylvania court has ruled that a leg amputation and a back injury, both incurred by a workmen's compensation claimant in one accident, may produce total disability for which total-disability compensation may be awarded.

The claimant's leg was so seriously injured by a collapsing platform that it had to be amputated the day following the accident. This resulted, the workman claimed, in an aggravated lumbar condition. The workmen's compensation board awarded him compensation for total disability.

The employer and insurer contended that the leg-amputation and back injuries were separate and could not be combined to produce total disability and a total-disability award. In this connection they relied on testimony of the impartial medical expert that, given a normal leg, the claimant's back amounted to a partial disability of 15 per cent. Therefore, they claimed, the employee was entitled only to an award for the leg and for a partial disability.

But the Superior Court of Pennsylvania, declaring that the board could properly repudiate the insulation-of-injuries theory, affirmed the total disability award. The Court said it was within the board's prerogative to reject the partial-disability medical testimony.

(*Spina* v. *Gahagan Construction Company*, Superior Court of Pennsylvania, November 12, 1957, Wright, J.)

What's Happened Since . . .

■ On January 27, 1958, the Supreme Court of the United States:

REVERSED (unanimously, with MR. JUSTICE WHITTAKER not participating) the decision of the Court of Appeals for the Seventh Circuit in *C. E. Niehoff & Company* v. *Federal Trade Commission*, 241 F. 2d 37 (43 A.B.A.J. 354; April, 1957). The Seventh Circuit, while affirming an FTC cease-and-desist order, had ordered the effectiveness of the order held in abeyance, on the ground that the FTC had not proceeded against the manufacturer's competitors. The Supreme Court ruled that the Commission's order could not be suspended by the courts in the absence of a "patent abuse of discretion", which was not present in this case.

DENIED CERTIORARI in *A. H. Bull Steamship Company* v. *Seafarers' International Union*, 250 F. 2d 326 (44 A.B.A.J. 262; March, 1958), leaving in effect the decision of the Court of Appeals for the Second Circuit that the Norris-LaGuardia Act precludes a federal court from issuing an injunction under the Taft-Hartley Act enjoining a strike in violation of a no-strike provision in a labor contract.

DENIED CERTIORARI in *McCarroll* v. *Los Angeles County District Council of Carpenters*, 315 P. 2d 322 (44 A.B.A.J. 263; March, 1958), leaving in effect the decision of the Supreme Court of California that the no-injunction provisions of the Norris-LaGuardia Act do not preclude a state court from issuing an injunction enjoining a strike in violation of a no-strike provision in a labor contract.

■ On February 3, 1958, the Supreme Court of the United States:

DENIED CERTIORARI in *U.S.* v. *Silverman*, 248 F. 2d 671 (43 A.B.A.J. 1026; November, 1957), leaving in effect the decision of the Court of Appeals for the Second Circuit that the convictions of five Communists under the Smith Act were vitiated by the absence of evidence of "advocacy of action" to overthrow the government by force and violence, as required by the Supreme Court's decision in *Yates* v. *U.S.*, 77 S. Ct. 1064.

■ On January 17, 1958, the Supreme Court of California (320 P. 2d 16) affirmed the decision of the California District Court of Appeal, First District, in *Biakanja* v. *Irving*, 310 P. 2d 63 (43 A.B.A.J. 830; September, 1957), that an unlicensed person who negligently draws a will which is invalid for lack of attestation is accountable in monetary damages to the person who would have been sole beneficiary had the will been validly prepared and executed.

Tax Notes

Prepared by Committee on Publications, Section of Taxation, Francis W. Sams, Chairman.

Deductibility for Tax Purposes: Expenses and Fines in Antitrust Cases

As a result of the large increases in amounts of fines being assessed in cases involving asserted violations of the federal antitrust laws, questions become more important respecting the proper tax treatment by a corporation (for deduction purposes) to be accorded the payment of such fines and the legal and other expenses incurred in defense of antitrust suits.[1]

1. *Legal and Other Expenses*

The landmark case in this area is *Commissioner* v. *Heininger*, 320 U. S. 467 (1943). There, the taxpayer, a licensed dentist, was engaged in the business of selling dentures by mail. He incurred attorneys' fees and related expenses in unsuccessfully resisting the issuance of a "fraud order" by the Postmaster General, and then deducted these expenses on his tax return. The Supreme Court allowed the deduction, stating (pages 474-5):

> The single policy of these [mail fraud] sections is to protect the public from fraudulent practices committed through the use of the mails. It is not their policy to impose personal punishment on violators; such punishment is provided by separate statute, and can be imposed only in a judicial proceeding in which the accused has the benefit of constitutional and statutory safeguards appropriate to trial for a crime. Nor is it their policy to deter persons accused of violating their terms from employing counsel to assist in presenting a bona fide defense to a proposed fraud order. It follows that to allow the deduction of respondent's litigation expenses would not frustrate the policy of these statutes; and to deny the deduction would attach a serious punitive consequence to the Postmaster General's finding which Congress has not expressly or impliedly indicated should result from such a finding....

Subsequent to the *Heininger* case, one further case is particularly relevant, *i.e., Commissioner* v. *Longhorn Portland Cement Co.*, 148 F. 2d 276 (5th Cir.) *cert. den.*, 326 U.S. 728 (1945). One of the issues in that case was the deductibility of attorneys' fees and related expenses incurred by the taxpayer in the compromise of a suit for the recovery of certain penalties brought by the State of Texas under the state's antitrust statute. On advice of counsel, the taxpayer compromised the suit by paying a fine of $50,000 and consented to an injunction against certain of its activities. The legal and other expenses were held to be deductible,[2] a decision in which the Service acquiesced (1944-1 Cum. Bull. 18), and the fines nondeductible.

On the basis of the *Heininger* and *Longhorn* cases, the Service issued G.C.M. 24377,[3] in which it changed its prior position to permit the deduction of legal expenses incurred by a corporation in defense of a suit brought against it and certain of its officers and directors for violation of the Sherman Antitrust Act even though the corporation was found guilty (the individual defendants being found not guilty). The ruling was specifically limited to the corporation's own expenses, however, and did not sanction the deduction by the corporation of the expenses attributable to the defense of the individual defendants. The conclusion reached was:

> The language quoted from the opinion in the *Heininger* case, to the effect that the legal expenses are both "ordinary and necessary" when incurred in good faith in defense of an action which threatens the nature and conduct of the business in which the taxpayer is engaged *even where the alleged violation was proven*, is believed to be directly in point in connection with the legal expenses involved in the instant case.... [Italics in original.]

It is relevant to note at this point that the expenses that may be deducted include not only attorneys' fees but accounting fees, the fees of expert witnesses and court costs. *Greene Motor Co.*, 5 T.C. 314 (1945).

Although no case has allowed the deduction of attorneys' fees incurred in the defense of an antitrust action in which the taxpayer was convicted after a trial, it can reasonably be stated in view of the foregoing, that all expenses of defending antitrust suits, civil or criminal, are deductible whether the taxpayer wins, loses or settles the suit. Certainly there should be no distinction between expenses incurred in antitrust litigation resulting in a consent judgment and those incurred in suits which are lost after trial. There may be some question, however, in criminal antitrust suits which are lost in view of the Tax Court's insistence that expenses incurred in unsuccessfully defending criminal prosecutions are not deductible despite the decision in *Heininger*. See, *e.g., Thomas A. Joseph*, 26 T. C. 562 (1956).

2. *Fines and Penalties*

Even after the decision in the *Heininger* case, fines, penalties and compromise payments made pursuant to consent decrees in Government-instituted civil or criminal antitrust suits have been held non-deductible even where the taxpayer asserted that it was not guilty. The point was squarely considered in *Longhorn* (see also *Universal Atlas Cement Co.* v. *Commissioner*, 9 T. C. 971, affirmed *per curiam*, 171 F. 2d 294 (2d Cir. 1948), certiorari denied 336 U. S. 962). The rationale of these cases is set forth in *Longhorn* as follows (page 277):

> The test universally employed to determine the applicability of the doctrine

1. Re: Increase in Fines. See REPORT OF THE ATTORNEY GENERAL'S COMMITTEE TO STUDY THE ANTITRUST LAWS, page 352 (1955).
2. Thus the *Heininger* case overruled *National Outdoor Advertising Bureau, Inc.* v. *Helvering*, 89 F. 2d 878 (2d Cir. 1937).
3. 1944-1 Cum. Bull. 93.

of any such claimed deduction is whether the sums claimed were paid as penalties. Thus all expenses incurred in the successful defense of a suit to impose a fine or penalty against a business are deductible. Even expenses incurred in unsuccessfully resisting the issuance of a fraud order, which would destroy one's business, are not required to be denied as a matter of law; if deduction for such expense is to be denied, it must be because allowance would frustrate sharply defined public policies.

To be distinguished are the cases allowing a deduction for amounts paid to the OPA as a result of price ceiling violations. In these cases, the violation involved was unintentional or accidental. See *Jerry Rossman Corporation* v. *Commissioner*, 175 F. 2d 711 (2d Cir. 1949).

The question of deductibility of fines and penalties has to date not been passed upon by the Supreme Court. The Court now has under consideration, however, two cases involving the deduction of fines and penalties resulting from violations of state statutes regulating the weight limit of trucks. *Hoover Motor Express Co.* v. *United States* (M. D. Term 1955) 135 F. Supp. 818, affirmed *per curiam*, 241 F. 2d 459 (6th Cir. 1957) certiorari granted, 354 U.S. 920; *Tank Truck Rentals* v. *Commissioner*, 242 F. 2d 14 (3d Cir. 1957) certiorari granted, 354 U. S. 920. It is conceivable, but very improbable, that the result in these cases would render antitrust fines deductible.

3. *Expenses Paid on Behalf of Officers and Directors*

Where directors and officers have been joined with the corporation as party defendants in a criminal action which arose directly out of its business and the defense was successful or the suit was compromised, a full deduction by the corporation of the expenses incurred has been allowed. *Cooper Foundation*, 13 T. C. 209 (1949). However, if the attorney's services are not performed "primarily" for the corporation's benefit but are performed essentially for the personal interest of the directors or shareholders, there is authority to the effect that the corporation will not be permitted to deduct such fees paid by it. *Knight-Campbell Music Co.* v. *Commissioner*, 155 F. 2d 837 (10th Cir. 1946).

In this connection, reference should again be made to G.C.M. 24377. It is believed that this ruling should not be interpreted to mean that under no circumstances may a corporation deduct the cost of defending its directors and officers in antitrust litigation. It should only be considered in the light of the state court authorities holding that such expenses are not necessarily a payment on behalf of the individual defendants but may be primarily for the benefit of the corporation covering the activities of the directors and officers in their representative capacities. *Simon* v. *Socony-Vacuum Oil Co.*, 47 N.Y.S. 2d (1st Dept., 1942). This being so, it may be stated that probably a substantial portion of such expenses are deductible by the corporation.

A corporate taxpayer might do well to enter into an arm's-length indemnification agreement with its officers, under which it agrees to pay all costs of defending a suit brought against them individually for any violation or alleged violation directly connected with their employment. This should probably be made at the time the employment contract is entered into. The expenses of defending an officer were allowed as a deduction to the corporation in *Union Investment Co.* 21 T.C. 659 (1954), where the by-laws of the corporation provided for such an indemnification. This decision was acquiesced in by the Service. 1954-2 Cum. Bull. 6.

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4. *Treble Damage Judgments and Settlements*

It seems clear that amounts paid to private parties as a result of settlements under a treble damage action or judgments in such actions are deductible, and in fact the Service allows deductions for such amounts.[4] See *Helvering* v. *Hampton*, 79 F. 2d 358 (9th Cir. 1935). Apparently, the reasoning behind such allowance is that these amounts properly are treated as liquidated damages rather than as penalties.[5]

In regard to future activities growing out of the connection between the tax and the antitrust fields, it does seem "that a comprehensive and thorough evaluation of antitrust policy requires further study of the tax elements".[6] This is not only so in the area of fines and legal expenses. For instance, the Internal Revenue Service is now seeking to disallow many benefits to a taxpayer asserted to be violating the antitrust laws, including exemption as a business league and the tax free treatment of certain mergers. Congress might well consider amendatory legislation, if desirable, rather than leaving the results to possible judicial legislation.

4. See Avakian, *Deductibility of Expenses Growing Out of Violation of Law or Public Policy*, 28 CAL. S.B.J. 365, 372 (1953); Marcus, *An Antitrust Legislative Program*, 44 GEO. L. J. 362, 387-388 (1956).

5. For instance, double damages designated as "liquidated damages" under Section 16(b) of the Fair Labor Standards Act 1938 are deductible. I. T. 3762, 1945 C.B. 95.

6. REPORT OF THE ATTORNEY GENERAL'S COMMITTEE TO STUDY THE ANTITRUST LAWS, page 342 (1955).

OUR YOUNGER LAWYERS

Frank C. Jones, Macon, Georgia, Editor-in-Charge

Atlanta was the scene of a highly productive and enjoyable week end of JBC activity on February 21-23, as the Executive Council, governing body of the JBC, heard reports from the four directors and from all twenty-two committees and took official action on many matters. A meeting of the Board of Directors was held on Friday afternoon, February 21, and sessions of the Executive Council were held on Saturday, February 22, and on Sunday, February 23. The JBC members departed from their busy working schedule for several social events, including a reception of the Georgia Bar Association and a dinner-dance sponsored by its Younger Lawyers Section.

Membership Campaign Approved

Certainly the most important item on the agenda was consideration of the "crash" membership campaign scheduled nationally for April 15 to May 1. Enthusiastic approval was given to the program outlined by S. David Peshkin, of Des Moines, Chairman of the JBC Membership Committee, and Robert G. Storey, Jr., of Dallas, the Association's Membership Chairman. This campaign has as its goal an increase in the Association's membership from the present level of slightly more than 88,000 to a total of at least 100,000. An allocation of $25,000.00, including $5,000.00 from JBC budgeted funds, has been made for expenses of the drive.

The organizational structure includes a chairman for each JBC circuit, with the council member for that circuit acting as adviser, and separate chairmen for each state and for each metropolitan area (over 100,000 population). Any JBC member who desires to participate in this all-out endeavor is urged to get in touch with his local chairman.

On March 1, Chairmen Peshkin and Storey and National JBC Chairman Bert H. Early of Huntington, West Virginia, met in Chicago with the vice chairmen of the Membership Committee from all circuits. Detailed plans were formulated at this meeting for implementation of the campaign. Regional meetings of the state chairmen and local meetings within the various states were scheduled to follow. Particular emphasis will be directed toward those highly populated areas offering the greatest membership potentials.

Thurmond Bill Again Endorsed

Among the reports received at Atlanta was that of the Military Service Committee, which is headed by John E. Nolan, Jr., of Washington, D. C. This committee has been particularly concerned in recent months with legislation directed to the pay and morale problems of military lawyers. These problems, which are critical at the present time and are growing worse, arise from the fact that military service is no longer an attractive career for a lawyer and the services are finding it extremely difficult to retain their best qualified attorneys.

The Council unanimously reaffirmed a resolution passed at the JBC meeting in New York last summer expressing unqualified approval of legislation now pending in both houses of Congress—generally known as the Thurmond Bill—which provides essentially that lawyers should receive pay and promotion credit comparable to that now accorded to doctors and other professional men on duty in the armed forces.

Other functions of this committee at present include the following:

(a) *Development of a closer relationship between the military lawyer and the organized bar.* Representatives of the committee have traveled from Washington to Charlottesville, Virginia, to address members of each graduating class at the Army Judge Advocate Generals' School on the importance of bar association work and the advantage of membership in the American Bar Association to a military lawyer. These talks have been enthusiastically received and their success may be judged from the fact that better than 75% of each graduating class now joins the American Bar Association.

(b) *Institution of a program which will make available to local bar groups military lawyers who are qualified to speak on selected topics of mutual interest.* Included would be such subjects as government contract and procurement matters, rights of a defendant tried by court martial, and various aspects of international law. The committee is arranging to have the names of military lawyers furnished to local bar groups in the areas where such military lawyers are stationed.

(c) The committee has continued its *interest in the proper utilization of lawyers in the armed forces* and it is available to intercede on an ad hoc basis in deserving cases.

Vice chairmen of the committee are: Edwin S. Rockefeller, J. Parker Connor, Ben C. Fisher, Robert J. Corber, John P. Arness, Capt. Richard C. Bocken, William A. Kehoe, Jr., John T. Miller, Jr., Maj. Lawrence H. Williams, all of Washington, D. C.; Alan S. Gaynor, Savannah, Georgia; Matthew G. Herold, Jr., New York; Richard L. Thies, Denver; Robert G. Tobin, Jr., Silver Spring, Maryland. James R. Stoner, of Washington, is Council Adviser.

Vanderbilt Survey Committee Enters Second Phase

Chairman John S. Rendleman, of Carbondale, Illinois, reported that his committee had completed the first phase of its program, to wit, the compilation of questionnaires relating to the degree of acceptance which the sixteen resolutions passed by the Conference of Chief Justices and the Conference of Governors in 1951 have been accorded by the various states. In this connection a highly successful series of meetings with state traffic chairmen were held in January at Chi-

cago, Denver, Las Vegas, New Orleans, Richmond, and New York City. The Council gave this committee authorization to proceed with the second and final phase of the program, which will involve, as far as possible, implementation of the resolutions in each state.

TV and Radio Scripts Requested

J. Rex Farrior, Jr., of Tampa, Chairman of the Public Information Committee, reported that a number of state and local bar groups have inquired where they can obtain television and radio scripts, recorded radio programs, films, and the like. Apparently there is no such general list now available and this committee proposes to compile one during this year as one of its functions. Any state or local association having available material of the sort above described is requested to notify Chairman Farrior at Tampa Theatre Building, P. O. Box 3324. It is anticipated that arrangements will be made wherever feasible to have such scripts reproduced at the national office with a view toward developing a permanent library of programs.

This committee has state membership and eight vice chairmen, five of whom have thus far been assigned duties relating to specific fields of public relations activity as follows: Publicity—William K. Bachelder, Chicago; Television—Jeffrey B. Smith, Baltimore; American Citizenship—Jay McKay, Columbia, South Carolina; Public Speakers—Gould B. Hagler, Augusta, Georgia; and Radio—Roger H. Little, Springfield, Illinois.

Activities of Sections

SECTION OF INSURANCE NEGLIGENCE AND COMPENSATION LAW

At the regular midyear meeting of the Council of the Section of Insurance, Negligence and Compensation Law, held in Room 14 of the Atlanta Biltmore Hotel, Atlanta, Georgia, on February 22, 1958, acting in accordance with the By-Laws of the Section the Council unanimously nominated the following persons for officers and Council members:

Chairman.....Stanley C. Morris
Charleston, West Virginia
Chairman-Elect....John J. Wicker, Jr.
Richmond, Virginia
Vice Chairman...Welcome D. Pierson
Oklahoma City, Oklahoma
Secretary.....Robert P. Hobson
Louisville, Kentucky
Council Member.....John R. Dixon
St. Louis, Missouri
Council Member.....Cecil C. Fraizer
Lincoln, Nebraska
Delegate to the House of Delegates....George E. Beechwood
Philadelphia, Pennsylvania

SECTION OF CORPORATION, BANKING AND BUSINESS LAW

The participation of the Section in the Southern Regional Meeting, February 20-22, and the Midyear Meeting of the American Bar Association, February 23-25, both in Atlanta, Georgia, was most successful.

The series of short talks on February 20 in the field of "What the General Practitioner Should Know About Sources and Methods of Financing Small Businesses" was presented to an enthusiastic audience, and unfortunately many had to be turned away. John Mulford, of Philadelphia, Chairman of the Section's Committee on Federal Regulation of Securities, spoke on "Private Placements and Intrastate Offerings of Securities", emphasizing the extreme care which is necessary to make sure that no single transaction occurs which would vitiate the exception for the entire issue. James T. Glavin, of New York, spoke from a paper on "Securities Offerings and Matured Regulation A—Requirements and Risks" prepared by himself and by Francis J. Purcell, of New York, in which they emphasized the responsibility of legal counsel (i) to "cross examine" his own clients to be sure that all of the material facts are accurately reflected in the offering circular and (ii) to follow the details and reporting of the transaction until all of the securities are sold because a Regulation A filing never becomes "effective" in the sense that a registration statement does, and the exemption depends on compliance with the regulation until the distribution is completed and reported. Carl W. Funk, of Philadelphia, Chairman of the Section's Committee on Banking, prepared an outstanding paper on "Commercial Credit, Including Bank Loans, Receivable Financing, and Field Warehousing" in which he developed not only the elements of bank financing but those of factoring, sale and lease-back, and field warehousing. Roland Maycock, of New York, Associate Counsel of Metropolitan Life Insurance Company, spoke principally on the availability through local banks of a plan which has been in effect at Metropolitan for some years under which Metropolitan may take up to a 90% participation in bank loans for small businesses. Donald J. Evans, 84 State Street, Boston 9, can be contacted for detailed information about such corporations. Philip McCallum, General Counsel for the Small Business Administration, spoke on "Loans by the Small Business Administration", emphasizing the desirability of counsel's first discussing the client's problem with the local office of the Small Business Administration and then carefully documenting the material which is required to be submitted with an application. The April issue of *The Business Lawyer*, the quarterly publication of the Section, will carry the above papers in full.

The panel discussion on "What the General Practitioner Should Know

about Out-of-Court Settlements with Distressed Debtors, Arrangement Proceedings under Chapter XI, and Bankruptcy Proceedings" was so well received that it had to be moved to a larger auditorium. The discussion was moderated with consummate skill by John E. Mulder, of Philadelphia, Director of the Committee on Continuing Legal Education of the American Law Institute. We are deeply indebted to the contributions made by panel members Bertram K. Wolfe, Referee in Bankruptcy, Philadelphia; F. M. Bird, former Referee in Bankruptcy, Atlanta; Sydney Krause, of New York, Chairman of the Section's Committee on Bankruptcy; and Charles E. Nadler, Professor at the Walter F. George School of Law, Mercer University, Macon, Georgia. Much of the material presented in this panel discussion is summarized by the article of John Mulder which was published in the January, 1957, issue of *The Business Lawyer*.

The midyear meeting of the House of Delegates adopted all three recommendations submitted by the Section through its delegate, Churchill Rodgers, of New York. See pages 384-386 of the Proceedings of the House of Delegates.

The midyear reports of the Chairmen for the several Committees of the Section disclose many interesting new projects and substantial progress on old projects. Among some of the items of immediate current interest are the suggestion of Louis P. Haller, Chairman of the Committee on Non-Profit Corporations, that the Council of the Section appoint a committee to study the desirability of organizing a new Committee on Cooperatives. Those interested in such a committee should communicate with Mr. Haller, 77 West Washington Street, Chicago 2. Carl W. Funk, Chairman of the Committee on Banking, reports that a tentative draft of a Uniform Foreign Bank Loan Act prepared by a subcommittee of the Conference of Commissioners on Uniform State Laws is being studied by his Committee and those members of the Section who have indicated their interest in this field. He has also filed a written statement on behalf of the American Bar Association with the House Banking and Currency Committee, supporting proposed Section 23 of Title III of the proposed Financial Institutions Act of 1957 relating to bank mergers.

The April issue of *The Business Lawyer* will be mailed shortly to all members of the Section. George D. Gibson, its Editor, has again presented a wide variety of articles of outstanding interest to those engaged in corporation, banking and business law. New members of the Section who join at this time will receive copies of the April issue. A letter of application to William H. Nieman, Atlas Bank Building, Cincinnati 2, Ohio, accompanied by a check for the $5.00 annual Section dues, is all that is required to participate in this and many other benefits of membership in the Section of Corporation, Banking and Business Law.

SECTION OF JUDICIAL ADMINISTRATION

By actual count there were 973 laymen, lawyers and judges in attendance at the "Layman Advises the Court" program in Atlanta, Georgia, on February 20, and it was interesting to note that the laymen outnumbered the lawyers and judges combined by more than two to one. The program was moderated by Chief Judge Bolitha Laws and the keynote speaker was General David Sarnoff, Chairman of the Board of Radio Corporation of America. A distinguished panel of participants included Chief Justice John R. Dethmers, of Lansing, Michigan, Judge Elbert Tuttle, of Atlanta, Judge Ivan Lee Holt, Jr., of St. Louis, Missouri, Caroline K. Simon, of New York City, Richard H. Rich and Ralph McGill, both of Atlanta. A comprehensive descriptive brochure is now being prepared to enable the Section's state committees to effectively present the merits of the program to their state judicial officers and to perfect the local organization required to obtain improvements in judicial administration where it is most needed.

The Section also sponsored a meeting jointly with the American Bar Association's Special Traffic Court Program Committee, at which strong emphasis was laid on the importance of these courts as courts of first impression to the average citizen. In cooperation with the Attorney General's Conference on Court Congestion and Delay in Litigation, the Section held a "what to do about it" session presided over by Judge Alfred Murrah of the U.S. Court of Appeals for the Tenth Circuit, and moderated by Deputy Attorney General Lawrence Walsh. Speakers included Judge Warren Burger of the U.S. Court of Appeals for the District of Columbia, Solicitor General J. Lee Rankin, Judge Nathan Cayton, Leland Tolman, of New York City, and Assistant Attorneys General George C. Doub, Charles K. Rice and Perry W. Morton.

Bills have been introduced in both houses of the Congress to authorize the Judicial Conference of the United States to conduct a continuous study of the rules of procedure in the various areas where the Supreme Court is charged with responsibility by law. These bills are pending before the respective Judiciary Committees, and were unanimously endorsed by the House of Delegates at the Atlanta Midyear meeting.

In its studies of ways and means to improve the administration of justice, the Section concerns itself with the viewpoints of litigants, jurors and the public, as well as of the judges and lawyers. It welcomes suggestions and inquiries as to specific problems and as to the assistance which the Section may be in a position to offer in overcoming them.

Department of Legislation

Charles B. Nutting, Editor-in-Charge

Frank E. Horack, Jr.: An Appreciation

The study of legislation in law schools has received but recent recognition. This is dramatically illustrated by the fact that Frank E. Horack, Jr., whose untimely death at the age of fifty occurred in November, 1957, can fairly be thought of as one of the pioneers in the field. Although highly regarded by all of his colleagues in law teaching, he was held in particular esteem by teachers of legislation. Thus, recognition of his work in these pages is appropriate.

Perhaps it was not inevitable, but it was surely to be expected that Frank Horack would make the study of legislation his principal field of endeavor. The son of a political scientist and the nephew of a distinguished teacher of law, his interest in government manifested itself early in his career. At Harvard from 1929 to 1931, when he received the S.J.D. degree, he was one of a small group studying under James M. Landis, whose seminar in legislation exercised a profound influence over the lives of a number of young scholars. His interest strengthened by this experience, Horack became a member of the faculty of the West Virginia University Law School and almost immediately published the first of a long series of articles dealing with legislation and, particularly, with statutory interpretation.[1] However, his interest was more than merely academic. In 1934 he became legislative counsel to the Governor of West Virginia. For the remainder of his life he was to occupy a variety of governmental positions in which his knowledge of legislation was given practical effect. He served with the United States Treasury Department, was organizational adviser to the General Counsel, Federal Security Agency and engaged in numerous consulting activities with state and local governments. His years of public service in these many capacities undoubtedly contributed to the deep understanding of the legislative process which was characteristic of his work as a professor in the Indiana Law School for more than twenty years.

When Horack was chosen to prepare the third edition of Sutherland's authoritative work on *Statutory Construction*, his status as a leader in the field of legislation was clearly acknowledged. However, perhaps of more significance to legal educators was the publication of his casebook on legislation, a second edition of which has recently appeared. His later interest in land use controls resulted in the preparation (with Val Nolan, Jr.) of a volume on the subject which was published in 1955. In this new field of the law he was, again, a pioneer whose leadership had already made itself felt.

However, a mere reference to his scholarly works and his activities in public service does not at all indicate the true significance of Horack's career. Through his writings one may trace a developing philosophy of legislation which, although changing in emphasis from time to time, preserved a remarkable continuity. This philosophy had its roots in the assumption that legislation is a creative force in the legal system. Whether the techniques of statutory construction were being considered or some broad question of public policy was under scrutiny, this point of view prevailed. It was thus difficult for him to be patient with the common law view of the province of legislation and the consequent tendency of courts to restrict its scope. He thought many of the rules of statutory construction useless if not meaningless. Thus, in his introduction to the third edition of Sutherland, he said:[2]

> It [the third edition] sets forth the customary rules of construction and seeks to evaluate them in terms of their usefulness; and then, because all rules are meaningful only as they apply to specific circumstances, to consider in many chapters the application of the rules of interpretation to particular fields of the law. . . .
>
> The third edition reflects the growing acceptance of statutes as a creative element in the law, rather than, as Sutherland suggested in the first edition, a "legislative interference".

Further examples of his views on interpretation can readily be cited. They were undoubtedly conditioned by the philosophy of legislation as a creative force previously mentioned. One should, he felt, seek to discover and fulfill the legislative purpose. For this reason it was Horack's belief that courts should use legislative materials in the same way that they employ judicial precedents. The rules of statutory construction, he contended, really were explanations of predetermined results rather than guides to decision.[3] Instead of these devices, courts should use any sources of interpretation without explanation or apology in the same way that judicial materials are cited. However, if this is to be done, legislatures should co-operate by furnishing proper materials to indicate their purpose in enacting legislation. The problem, Horack felt, was the production rather than the use of legislative materials. Only four or five states in addition to the Federal Government have provided them, and then only to a rudimentary degree. Co-operation between the courts and the legislatures through judicial and legislative councils was suggested as a possible solution.[4]

The matter of co-operation between courts and legislatures was one with which Horack was deeply concerned. Twenty years ago in an article entitled "The Common Law of Legislation"[5] (he was fond of paradox) he pointed out the similarity between the development of common law and legislative rules through the use of precedent. The latter, he maintained, had a similar consistence and order. There should,

1. Horack, *In the Name of Legislative Intention*, 38 W. Va. L. Q. 119 (1932). As an indication of the extent of his contribution to legal literature it may be noted that Horack's name, usually under more than one heading, appears in every cumulative volume of the Index to Legal Periodicals since that covering 1931-34.
2. Sutherland, Statutory Construction (3d Ed. by Frank E. Horack, Jr., 1943), vi.
3. Horack, *Disintegration of Statutory Construction*, 24 Ind. L.J. 335 (1949).
4. Horack, *Cooperative Action for Improved Statutory Construction*, 3 Vand. L. Rev. 365 (1950).
5. 23 Iowa L. Rev. 41 (1937).

he believed, be a close interrelation between the development of legislative and judicial rules. Law schools are in a position to encourage this development but do not take advantage of their opportunities.

The philosophy of legislation as a creative force has implications apart from statutory construction or judicial attitudes toward enacted law. Legislation is a tool to be used in the solution of social problems. No one believed this more thoroughly than Frank Horack. Indeed, perhaps the most significant part of his career is found in his work as a draftsman and consultant. Others can speak of his contribution as a Commission on Uniform State Laws from Indiana, a position he held with distinction for a number of years. In general, however, his efforts in this area were characterized by his belief in the necessity of careful research and investigation as a prelude to wise law making. He urged frequently and forcefully that scientific data be used in the preparation of legislation.[6] He chided the legal profession for its lack of competence in using such data and suggested the desirability of acquiring the necessary skill through studies of the costs incurred in furnishing various types of legal services.

He was not, however, unaware of the problems involved in the development and use of scientific data by legislatures and courts. In a commentary on the *Kinsey Report* he pointed out that the most serious issue involved was not really the subject matter of the volume, but rather whether lawyers can and will use scientific data and, on the other hand, whether scientists are able to produce data useful for legislative, administrative and judicial rule making.[7]

One might reasonably have hoped that the productive life of this fine scholar would have extended for another twenty years. As it is, the contribution which he made is still significant. He brought a rare combination of skills to the law, and left it the better for his industry and devotion.

6. Horack, *Legislative Adaptation of Scientific Discovery*, 28 Neb. L. Rev. 506 (1949).
7. Horack, *Sex Offenses and Scientific Investigation*, 44 Ill. L. Rev. 149 (1949).

Committee on Law Lists Issues Certificates of Compliance

The following publishers of law lists and legal directories have received Certificates of Compliance from the Standing Committee on Law Lists of the American Bar Association for their 1958 editions:

Commercial Law Lists

A. C. A. List
Associated Commercial Attorneys List
165 Broadway
New York 6, New York

The American Lawyers Quarterly
The American Lawyers Company
1712 N.B.C. Building
Cleveland 14, Ohio

The B. A. Law List
The B. A. Law List Company
759 No. Milwaukee Street
Milwaukee 2, Wisconsin

The Clearing House Quarterly
Attorneys National Clearing House Co.
3539 Hennepin Avenue
Minneapolis 8, Minnesota

The Columbia List
The Columbia Directory Company, Inc.
320 Broadway
New York 7, New York

The Commercial Bar
The Commercial Bar, Inc.
521 Fifth Avenue
New York 17, New York

The C-R-C Attorney Directory
The C-R-C Law List Company, Inc.
15 Park Row
New York 38, New York

Forwarders List of Attorneys
Forwarders List Company
38 South Dearborn Street
Chicago 3, Illinois

The General Bar
The General Bar, Inc.
36 West 44th Street
New York 36, New York

The International Lawyers
International Lawyers Company, Inc.
33 West 42d Street
New York 36, New York

The Mercantile Adjuster
The Mercantile Adjuster Publishing Company
7109 Greenwood Avenue
Seattle 24, Washington

The National List
The National List, Inc.
122 East 42nd Street
New York 17, New York

Rand McNally List of Bank Recommended Attorneys
Rand McNally & Company
P. O. Box 7600
Chicago 80, Illinois

Wright-Holmes Law List
Wright-Holmes Corporation
225 West 34th Street
New York 1, New York

General Law Lists

American Bank Attorneys
American Bank Attorneys
18 Brattle Street
Cambridge 38, Massachusetts

The American Bar
The James C. Fifield Company
121 West Franklin
Minneapolis 4, Minnesota

The Bar Register
The Bar Register Company, Inc.
One Prospect Street
Summit, New Jersey

Campbell's List
Campbell's List, Inc.
905 Orange Avenue
Winter Park, Florida

International Trial Lawyers
Directory Publishers, Inc.
84 Cherry Street
Galesburg, Illinois

The Lawyers Directory
The Lawyers Directory, Inc.
830 Ingraham Building
Miami 32, Florida

MARKHAM'S NEGLIGENCE COUNSEL
Markham Publishing Corp.
Markham Building
66 Summer Street
Stamford, Connecticut

RUSSELL LAW LIST
Russell Law List
10 East 40th Street
New York 16, New York

General Legal Directory

MARTINDALE-HUBBELL LAW DIRECTORY
Martindale-Hubbell, Inc.
One Prospect Street
Summit, New Jersey

Insurance Law Lists

BEST'S RECOMMENDED INSURANCE ATTORNEYS
Alfred M. Best Company, Inc.
75 Fulton Street
New York 38, New York

HINE'S INSURANCE COUNSEL
Hine's Legal Directory, Inc.
P.O. Box 71
Professional Center Building
Glen Ellyn, Illinois

THE INSURANCE BAR
The Bar List Publishing Company
State Bank Building
Evanston, Illinois

THE UNDERWRITERS LIST OF TRIAL COUNSEL
Underwriters List Publishing Company
308 East Eighth Street
Cincinnati 2, Ohio

Probate Law Lists

THE PROBATE COUNSEL
Probate Counsel, Inc.
First National Bank Building
Phoenix, Arizona

SULLIVAN'S PROBATE DIRECTORY
Sullivan's Probate Directory, Inc.
84 Cherry Street
Galesburg, Illinois

State Legal Directories

The following state legal directories published by The Legal Directories Publishing Company, 1072 Gayley Avenue, Los Angeles 24, California:

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PENNSYLVANIA LEGAL DIRECTORY

TEXAS LEGAL DIRECTORY

WISCONSIN LEGAL DIRECTORY

Foreign Law Lists

BUTTERWORTHS EMPIRE LAW LIST
Butterworth & Co. (Publishers) Ltd.
88 Kingsway
London, W.C.2, England

CANADIAN LAW LIST
Cartwright & Sons, Ltd.
2081 Yonge Street
Toronto 7, Ontario, Canada

THE INTERNATIONAL LAW LIST
L. Corper-Mordaunt & Company
Pitman House
Parker Street
London, W.C.2, England

KIME'S INTERNATIONAL LAW DIRECTORY
Kime's International Law Directory, Ltd.
102-A Southampton Row
London, W.C.1, England

On February 22, 1958, the Standing Committee on Law Lists issued Certificates of Compliance for the 1958 Editions of the following publications:

The LAWYER'S LIST published by the Law List Publishing Company, 521 Fifth Avenue, New York 17, New York.

MICHIGAN LEGAL DIRECTORY published by the Legal Directories Publishing Company, Inc., 1072 Gayley Avenue, Los Angeles 24, California.

Practicing Lawyer's guide to the current LAW MAGAZINES

Arthur John Keeffe, Washington, D. C., Editor-in-Charge

JUDICIAL BIOGRAPHIES: In all honesty, there have been very few good biographies of Justices of the Supreme Court of the United States. In my book, the four volumes that Albert J. Beveridge wrote about Chief Justice Marshall still rank first. Commager is in the course of publishing a new Marshall biography and the Marshall fan club can look forward to it. But it will have to be good to beat the job Beveridge did.

In 1939, Professor Charles Fairman published a study of Mr. Justice Miller (Harvard University Press, 431 pages) and in 1954, Donald Grant Morgan did one on Mr. Justice William Johnson (University of South Carolina Press, 326 pages). The year 1956 saw *Mr. Justice James Wilson* by Charles Page Smith (University of North Carolina Press, 426 pages); *Chief Justice Charles Evans Hughes* by Dexter Perkins, (Little Brown and Company, 200 pages); and *Chief Justice Harlan Fiske Stone* by Alpheus Thomas Mason (The Viking Press, 914 pages).

When those of my generation were law students, we were surfeited with essays and biographies of Holmes and Brandeis. Those essays are collected and published in separate volumes by Oceana Publications, 84th Avenue, New York 3, and can be had of not only Holmes and Brandeis but also Marshall and Webster for $1.00 in the paper edition and $3.50 in a cloth edition per volume. Alas, times and fashions change. Law students today will be taught, I fear, to look upon John Marshall Harlan of the nineteenth century as we did Holmes, Brandeis and Cardozo yesterday, even though Mr. Justice Frankfurter tells us that among nineteenth century Justices, Harlan was an "eccentric exception" (*Adamson* v. *California*, 332 U.S. 46, 67 S. Ct. 1672, 91 L. ed. 1903).

Because of his dissents in the *Civil Rights Cases*, 109 U.S. 3, in 1883, and in *Plessy* v. *Ferguson*, 163 U.S. 537, in 1896 which were vindicated in 1954, *Brown* v. *Board of Education*, 347 U.S. 483, we shall soon see new studies of Mr. Justice Harlan. Professor Alan F. Westin of the Department of Government at Cornell University was a Senior Fellow at Yale Law School in 1956-57, and he spent his year at Yale on the personal papers of Justice Harlan lent to him by the Justice's grandson, the twentieth century Mr. Justice John Marshall Harlan. Professor Westin examined other Harlan papers at the Library of Congress and the Law School of the University of Louisville. Under his own copyright, he writes in the April, 1957, *Yale Law Journal* a piece entitled "John Marshall Harlan and the Constitutional Rights of Negroes: The Transformation of a Southerner", Volume 66, No. 5, pages 637-710; address: 401 A Yale Station, New Haven, Connecticut; price: $2.00).

It is as interesting a biography as I have ever read. Little did I realize that Harlan had turned from the Know Nothing Party, upon whose ticket he was once elected Attorney General of Kentucky, to the position represented by his dissent in *Plessy* v. *Ferguson*. It seems Harlan and his father were followers of Henry Clay and Southerners devoted to the Union. After the Thirteenth, Fourteenth and Fifteenth Amendments became the law of the land, Harlan reversed his former opinions and made a boast of his inconsistency. At Blaine's request, he even went to Maine and campaigned with a Negro. His vote, however, nominated Hayes in 1876 and in October of 1877, President Hayes appointed him to the Court.

Westin has done a good job with the Harlan papers. He tells a good story but as a lawyer, I have my doubts as to his analysis of the validity of Harlan's constitutional philosophy (pages 693-710). This part of his piece is highly controversial and would seem the subject of another study.

Interestingly, *Vanderbilt Law Review* makes "Studies in Judicial Biography" its 1957 symposium issue. The piece there on Harlan is done by Professor David G. Farrelly of the Department of Political Science at U.C.L.A. He states he is collaborating with Westin on a new biography of Harlan. Farrelly's piece is shorter than Westin's but it is good. (Vol. 10, No. 2, Vanderbilt Law Review, February, 1957; address: Nashville 5, Tennessee; price: $2.00).

Besides the piece by Farrelly on Harlan, the Vanderbilt issue contains these biographies: Rutledge by Alfred O. Cannon, Dean of Alumni at Southwestern University, Memphis; Samuel F. Miller by Professor Charles Fairman of Harvard Law School, author of the full length biography of Miller, abovementioned; Taney by Professor Robert J. Harris of the Vanderbilt Political Science Department; Hughes by Samuel Hendel, Professor of Government at C.C.N.Y. and author of a one volume study of Hughes (King's Crown Press, Columbia University, 1951); Holmes and Brandeis by Samuel J. Konefsky, Professor of Political Science at Brooklyn College and author of "The Legacy of Holmes and Brandeis" (published in 1956 by The Macmillan Company); Learned Hand by Professor Robert S. Lancaster, Dean of Men at the University of the South in Sewanee, Tennessee; Frankfurter by Professor Wallace Mendelson of the Political Science Department of the University of Tennessee; William Cushing by Father F. William O'Brien, S.J., Professor of Government at Georgetown; and Murphy by Professor John P. Roche, Chairman of the Department of Politics at Brandeis University.

Besides the above biographies, Howard Jay Graham, of the staff of the Los Angeles County Law Library, writes on "The Supreme Court in History", and Professor Otis P. Dobie, of Louisville Law School, writes on "Recent Judicial Biographies: A Composite View".

I cannot praise this Vanderbilt issue too highly. Every symposium issue of Vanderbilt Law School has been excellent. But this one is especially so. If I have one regret, it is that so much judicial biography is left to political scientists and so little is done by lawyers. But you can also see from what was a famine, we have gone to a feast of judicial biographies. This is all to the good.

Proceedings of the House of Delegates

(Continued from page 341)

conducted with "fitting dignity and decorum" and that it was the duty of the judge to ensure that.

A trial is a public event, Mr. Hanson declared, and what transpires in the courtroom is public property. The real question about Canon 35 is "whether a Canon should consist of a sound statement of principle regarding the conduct of judicial proceedings, or attempt legislative enactment arbitrarily designed to deprive judges of control of their courts and to discriminate between publicly accepted methods for reporting trials. The fact that there has been improper coverage of trials by some media no more justifies the prohibitions of Canon 35 than the culpability . . . [of some judges] would justify the media in advocating the destruction of our cherished judicial system".

Mr. Hanson contended that there was an "irreconcilable conflict" between Canon 35 and the principle that the public should have absolute confidence in the integrity and impartiality of the administration of justice. "Confidence can be achieved only with knowledge", he declared.

He then turned to the history of Canon 35, saying that it was "adopted during a period of emotional disturbance resulting from the wholly improper conduct of the case and the reporting of the Hauptmann trial in the nineteen-thirties. . . . Both the Bar and the press believed that something should be done to prohibit a recurrence of such an episode in the future".

He went on to detail how a Special Committee on Co-operation Between the Press, Radio and Bar was established, headed by Newton D. Baker. The American Newspaper Publishers Association and the American Society of Newspaper Editors appointed committees to work with this Committee, he recalled, and those committees had worked together for two years. A final agreement was made impossible, he said, by the enactment of Canon 35 in 1937, without referring the matter to the Committee on Co-operation Between the Press, Radio and Bar. He called Canon 35 "not only drastic, but punitive in effect—the very antithesis of what the Committee on Co-operation was striving for. Its adoption was a rebuff not only to the Special Committee of this Association, but the media committees as well". The three committees had come very near to agreement, he said, and it was a "tragic day" when the Committee's 1937 report was cast into Limbo and its authors repudiated. The media do not seek to impose their views on the Association, Mr. Hanson told the House, "on any matter that has solely to do with the internal affairs of this great organization. But Canon 35 is not such a matter. It affects judges, lawyers, media and the public".

Mr. Swezey stated the question as "whether the transmitting or sound-recording of court proceedings by radio or TV introduces extraneous influences which tend to have a detrimental psychological effect on the participants". He said that he did not think that the Foundation Committee had dealt with that question convincingly. "It has satisfied itself and apparently hopes to satisfy you, gentlemen, with the continuance of a presumption completely unsupported by adequate research or observation". He went on to say that this was a sad contrast to the "thorough and painstaking inquiry of the Supreme Court of Colorado which arrived at findings quite antipodal to those of the Special Committee". The Colorado Supreme Court, Mr. Swezey stated, was the only Court that has ever held a rule-making hearing on the effect broadcasting a trial has on its participants, and "its decision is therefore based on established fact and personal observation rather than assumption and conjecture".

Declaring that this was an age of "electronic journalism", he urged the view that a public trial and hearing in a democracy should make use of every opportunity to keep pace with the expansion of our communities and our technological improvements.

Mr. Swezey also declared that it was entirely right that broadcasters, in choosing the trials to be broadcast, should confine their coverage to cases "involving issues of paramount public interest. It is a mistaken assumption, however, which I am afraid is being made by many members of the legal profession, that broadcasting is exclusively a medium for entertainment and diversion", he said. "Television and radio are informational media, peculiarly and favorably suited to the transmission of news. . . . There is no need for supposing any lesser degree of professional integrity among broadcasters than among lawyers, or doctors, or those engaged in newspapers and other media".

He insisted that radio and television coverage would not interfere with the orderly administration of justice, quoting at some length from Justice O. Otto Moore's holding on that point in Colorado.

He urged the House to "propose,

support, and encourage the conduct of further tests such as the one which was undertaken by the Supreme Court of Colorado, to determine without question the effect of the coverage of courtroom proceedings by radio and television".

The House, still sitting as a Committee of the Whole, then began its debate.

Sylvester C. Smith, Jr., of New Jersey, moved that the Committee of the Whole recommend that the restated Canon be deferred to the August meeting of the House in Los Angeles.

Walton J. McLeod, Jr., of Walterboro, South Carolina, was against postponement. "The studies may go on, but we are bombarded and will continue to be bombarded with this question", he declared. "I think we should settle this business of Canon 35, at least for this meeting of the House".

Alfred J. Schweppe, of Seattle, Washington, speaking in favor of postponement, said that he thought that action ought to be put off for two reasons: first, the restated Canon contained no substantial change, and might as well be deferred, and, second, he was unsure about the wisdom of one phrase in the restated Canon—"transmitting or sound recording of such proceedings for broadcasting by radio or television introduce extraneous influences which tend to have a detrimental psychological effect on the participants. . . . For my part", Mr. Schweppe said, "I do not intend to pass a psychological judgment upon what the result would be of the use of certain media in the courtroom without adequate psychological advice". He urged deferment of consideration "until we have competent studies by competent people on the psychological effect that this Committee earnestly and solemnly says is the result. . . . If we are not going to do anything substantial, let's stay where we are until we have further and better information".

Henry S. Drinker, of Philadelphia, Pennsylvania, Chairman of the Committee on Professional Ethics and Grievances, said that his Committee always tried to stay alert to changes in the Canons that were needed, but since the Canons have been adopted by many states, the Committee is reluctant to propose changes unless a change is really necessary. "We have found that there is a tremendous amount of confusion . . . and it happens when the Canons are amended", he said.

Frank E. Holman, of Seattle, Washington, urged that action be postponed. He was shocked to hear that the Bar-Media Committee had not been consulted on the proposed revision, he said, and the whole matter deserved to be considered over a period of time.

President Rhyne also urged postponement. "I have heard nothing that indicates to me that there is any great emergency that would require that we necessarily act today", he said.

Robert G. Storey, Jr., of Dallas, Texas, moved that the proposal be referred to "the Conference of Bar Presidents, the Bar Activities Section, and/or any other appropriate body".

Mr. Schweppe raised the point of order that the House was still a Committee of the Whole, and the only motion before it was a recommendation to the House that action be postponed.

Edward L. Cannon, of Raleigh, North Carolina, declared that "we have wasted a lot of time here if we are going to defer it. I don't object to deferring it, but I think that in the future we ought not to announce all these time schedules and have all this propaganda beforehand . . . and then have the very Chairman who set it up recommend that it be deferred".

Mr. Holman rose to a point of order, saying that the only function of the Committee of the Whole was to report to the House. The matter could be argued in the House, if the members liked, he said.

Mr. Smith said that the Foundation Committee had no authority to conduct hearings, and this manner of handling the subject had been adopted to give a hearing to the representatives of the media. It was not fair, he explained, to imply that Judge McCoy's Committee had denied a hearing. It had no authority to conduct hearings.

Mr. Storey's motion to refer the matter to some appropriate agency of the Association was put to a vote, and was lost.

The House then voted on Mr. Smith's motion to recommend deferral and that motion was carried.

The House then adjourned as a Committee of the Whole and reconvened in its regular session.

Barnabas F. Sears, of Chicago, speaking on the question of deferring the revised form of Canon 35 until August, spoke against any more delay. "I think if we don't want to face up to the issue now, we ought to say that we don't want to face up to that issue now, instead of trying to evade the issue by saying that we are not sufficiently informed with respect to that issue", he said. "I dare say that there is not a member of this House who does not know as much about the issue today as he will know next August".

William A. Sutherland, of Atlanta, Georgia, disagreed, saying that he expected to know a great deal more about the question at Los Angeles. "This is a subject on which I think we do have a duty to speak", he said, "and I do believe it is incumbent upon us to know what we are talking about when we speak".

Albert E. Jenner, Jr., of Chicago, Illinois, said that so far as he saw it, the only question for the House was, "Are the gentlemen of the press of the feeling that they have been afforded an adequate and fair hearing?" Mr. Jenner said that apparently they would like another chance to be heard, and, if so, it behooved the House not to deny them the privilege of presenting any further points they might have.

The House then voted, and the motion to defer action was carried.

Section of Judicial Administration

The House then heard the report of the Section of Judicial Administration, presented by Chief Judge John Biggs, Jr., of Wilmington, Delaware, who received unanimous consent to address the House in the absence of Justice Tom C. Clark, the Section's Chairman. Judge Biggs asked for approval of a resolution endorsing legislation to give to the Judicial Conference of the United States the authority to make a continuing study of the Federal Rules of Procedure and advise the Supreme

Court on revisions. Judge Biggs said that the legislation now pending in Congress had been approved by the Judicial Conference, and that it was hoped that the Association would put its imprimatur upon the proposal.

Franklin Riter, of Utah, spoke briefly, urging adoption of the resolution. General Riter said that many states had adopted the substance of the Federal Rules and were loath to make any amendments until the Federal Rules themselves had been amended.

The House then voted to adopt the resolution, which was as follows:

RESOLVED, That the American Bar Association recommend to the Congress that Section 331 of Title 28 of the United States Code, as amended, be further amended to empower the Judicial Conference of the United States to carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law, and that such changes in and additions to those rules as the said Judicial Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation and the elimination of unjustifiable expense and delay shall be recommended by said Conference from time to time to the Supreme Court for its consideration and adoption, modification or rejection; and

BE IT FURTHER RESOLVED, That the Association endorse S. 3152, 85th Congress, 2nd Session, introduced in the United States Senate by Senator Eastland on January 27, 1958, copy of which is available, and an identical companion bill H. R. 10154, introduced in the United States House of Representatives by Congressman Celler on January 21, 1958, which are designed to effectuate this resolution; and

BE IT FURTHER RESOLVED, That the Officers and Council of the Section of Judicial Administration are directed to urge the enactment of this legislation, or its equivalent in purpose and effect, upon the proper committees of Congress.

Committee on Federal Rules

The report of the Committee on Federal Rules of Civil Procedure was closely related to the action just taken by the House. The Committee, speaking through its Chairman, Edward E. Murane, of Casper, Wyoming, moved the adoption of the following resolution:

BE IT RESOLVED,

1. That the jurisdiction of this committee be amplified to consider all Federal Rules of Procedure; and that its membership be revised from 6 to 11, and that its name be changed to "Committee on Federal Rules".

2. That the committee co-operate with the Judicial Conference in the selection of active practicing members of the American Bar Association for membership on the Judicial Conference Rules Committee; and, on all matters relative to the study of, and any proposed amendments and revisions to the Federal Rules of Procedure.

The change in name of the Committee was suggested by the Board of Governors and adopted by the Chairman.

The House voted to adopt the resolution.

Committee on Customs Law

The Committee on Customs Law had two resolutions, the first of which was the following:

1. The Committee requests authority to propose and support the following amendments to the pending bill, H. R. 6006, or other proposed legislation which may be considered by the 85th Congress to amend the provisions of the Antidumping Act of 1921, as amended (19 U.S.C.A., Section 160, et seq.), by brief and by personal appearance in the name of the American Bar Association, before the Committee on Ways and Means, House of Representatives, and Committee on Finance, United States Senate.

A. Amend H. R. 6006 by inserting after line 4, page 1 thereof, the following:

"By adding at the end of subsection (a) thereof the following:
Provided, that adequate public notice shall be given of institution of investigations by the Secretary of the Treasury or the Tariff Commission hereunder, and in the course thereof and prior to any determination by either, all parties interested shall be given reasonable opportunity to appear, to produce evidence and be heard."

B. Further amend H. R. 6006 by inserting after line 4, page 1, and after amendment A above, the following:

"By adding at the end of subsection (a) thereof the following: Determinations of the Secretary of the Treasury and of the Commission shall include a full statement of the basis thereof and reasons therefor, and shall immediately be made public."

C. Further amend H. R. 6006 by inserting at page 8, following line 16, a new section to read as follows:

"Section 210 of the Antidumping Act, 1921, (19 U.S.C. 169), as amended, is further amended by inserting after the words 'sections 160 to 171 of this title' the following: determinations by the Secretary of the Treasury and by the United States Tariff Commission under this title so as to make the section read as follows:
For the purposes of sections 160 to 171 of this title, determinations by the Secretary of the Treasury and by the United States Tariff Commission under this title, the determinations of the appraiser or person acting as appraiser as to the foreign market value or the cost of production, as the case may be, the purchase price, and the exporter's sales price, and the action of the collector in assessing special dumping duty, shall have the same force and effect and be subject to the same right of appeal and protest, under the same conditions and subject to the same limitations; and the general appraisers, the United States Customs Court, and the Court of Customs and Patent Appeals shall have the same jurisdiction, powers, and duties in connection with such appeals and protests as in the case of appeals and protests relating to customs duties under existing law."

J. Bradley Colburn, of New York, New York, the Chairman of the Committee, in offering this resolution to the House, explained that a similar resolution had been adopted by the House a year ago. Since then, legislation has come before the Congress in such a form that the Committee felt a revision of the original resolution was called for. The changes were matters of form, not substance, he said.

In reply to a question posed by Mr. Miller, of Louisiana, Mr. Colburn said that the resolution represented the unanimous thinking of the Committee.

The House voted to adopt the resolution.

The Committee's second resolution, which was adopted without debate, was as follows:

The Committee requests further authority to oppose by brief and by

personal appearance in the name of the American Bar Association before the Committee on Ways and Means, House of Representatives and Committee on Finance, United States Senate, the provisions of H. R. 9424, 85th Congress, First Session, or similar legislation, which would create administrative review of the determination of appraised values of imported merchandise on the grounds that such proposal would delay final determination of dutiable values, would create a series of lay member administrative courts at numerous ports of entry throughout the United States, and might well operate to transfer a portion of the jurisdiction now vested in the United States Customs Court to such administrative lay tribunals.

Committee on Membership

Robert G. Storey, Jr., of Dallas, Texas, then reported for the Committee on Membership, of which he is the Chairman. He said that the Board of Governors had authorized funds for the campaign to recruit 12,000 members before the next Annual Meeting in order to bring the Association's total membership to 100,000. While most of the work will be done by the Junior Bar Conference, Mr. Storey said, the help of all members of the House was needed. The intensive portion of the campaign will be conducted during the last two weeks in April, culminating with Law Day—U.S.A. on May 1, he said.

Ed Ellis, of Boulder, Colorado, a member of the Membership Committee, spoke to the House, declaring that it was the duty of older members "to give every impetus to this drive".

S. David Peshkin, of Des Moines, Iowa, Chairman of the Junior Bar Conference's Committee on Membership, also spoke briefly, saying that he was optimistic enough to ask to have his report deferred until Los Angeles "at which time I may tell you the Association has gone over the 100,000 mark".

Section of Family Law

The next item on the calendar was the report of the Special Committee to Investigate the Advisability of a Section of Family Law, presented by Committee Chairman Godfrey L. Munter, of Washington, D. C. Mr. Munter declared that this was his final report. ". . . we have covered the field. . . . We have, I think, demonstrated to you that there is a great need for the establishment of this Section of Family Law, that very, very many members of the Association are interested in it, and thirdly that this Section will constitute a great reservoir for tapping new members". He then offered the following resolution creating a Section of Family Law:

WHEREAS, President David F. Maxwell of the American Bar Association on September 10, 1956, appointed a Special Committee To Investigate the Advisability of Establishing a Section of Family Law of the American Bar Association, which Special Committee was reappointed by President Charles S. Rhyne on July 30, 1957; and

WHEREAS, The said Special Committee at the Midyear Meeting in February, 1957, made its first report to the House of Delegates and its second report to the House of Delegates at the Annual Meeting in New York in July, 1957, recommending the establishment of a Section of Family Law and reflecting the deep interest of a large number of the members of the American Bar Association in such a Section and the need for such a Section; and

WHEREAS, The Board of Governors of the American Bar Association at its meeting in Chicago on October 20, 1957, adopted a Resolution to recommend to the House of Delegates that such a Section be established; and

WHEREAS, It appears that the proponents of the said Section have prepared and submitted a set of By-Laws for the proposed Section and have in every other respect complied with the requirements of the By-Laws of the American Bar Association relative to the establishment of new Sections thereof,

NOW, THEREFORE, BE IT RESOLVED by the House of Delegates of the American Bar Association, duly assembled at its Annual Midyear Meeting in Atlanta, Georgia, in 1958, that there shall be and there hereby is established a Section of Family Law of the American Bar Association;

RESOLVED, FURTHER, That the proposed By-laws of the Section of Family Law be and the same hereby are approved, subject to adoption by the Section when organized.

The resolution was adopted by the necessary two-thirds vote of the House, and the Section was created, to be organized at the Los Angeles Meeting.

Section of Administrative Law

Donald C. Beelar, of Washington, D. C., Chairman of the Section of Administrative Law, then reported for that Section. The Section required approval of some changes in its by-laws and was proposing four resolutions dealing with pending legislation. The amendments to the Section's by-laws and two of the four resolutions were adopted without debate. These two resolutions were as follows:

Resolutions re Immigration and Nationality:

1. RESOLVED, That the Section of Administrative Law recommends that the House of Delegates adopt the following resolution:

WHEREAS, Recent decisions of the Supreme Court of the United States have construed Section 10 of the Administrative Procedure Act as applicable to deportation and exclusion orders under the Immigration and Nationality Laws of the United States; and

WHEREAS, Legislation has been introduced in the Congress to restrict judicial review of deportation and exclusion orders under said laws.

BE IT RESOLVED, That the American Bar Association favors judicial review, under Section 10 of the Administrative Procedure Act, of deportation and exclusion orders under the Immigration and Nationality Laws of the United States and that the Section of Administrative Law be authorized and directed to oppose legislation designed to restrict judicial review of such orders.

2. RESOLVED, That the Section of Administrative Law recommends that the House of Delegates adopt the following resolution:

WHEREAS, The Board of Immigration Appeals of the Department of Justice is established by regulation only, with no statutory assurance of either its existence or jurisdiction,

BE IT RESOLVED, That it is the opinion of the American Bar Association that the Board of Immigration Appeals of the Department of Justice be granted statutory status and authority and that the Section of Administrative Law be authorized and directed to advance appropriate legislation to that end.

Resolution re Judicial Review:

RESOLVED, That the Section of Administrative Law recommends that the

House of Delegates adopt the following resolution:

BE IT RESOLVED, That the American Bar Association supports the enactment of H. R. 272, 85th Cong., 1st Sess., a bill to permit judicial review of decisions of the Administrator of Veterans' Affairs, with a recommended amendment which would substitute review in the appropriate United States District Court for review in the appropriate Circuit Court of Appeals and that it authorizes the Section of Administrative Law to appear before the Committees of Congress and to take such other steps as it deems appropriate to carry out this resolution.

The Section's remaining two resolutions had been offered too late for consideration by the Board of Governors. In such a case, the waiver of the rules must be obtained from the Committee on Rules and Calendar and the resolutions must be submitted to a special committee of the House for consideration and report. There was some question as to whether these conditions had been met, and, on motion of John C. Satterfield, of Jackson, Mississippi, the House voted to postpone consideration of the two resolutions until the following morning.

Legal Services and Procedure

The report of the Committee on Legal Services and Procedure was given by the Committee Chairman, Charles A. Horsky, of Washington, D. C. Mr. Horsky made a progress report on legislation previously approved by the House and placed under the jurisdiction of the Committee. The legislative proposals, growing out of the Hoover Commission Report, cover four areas—a Code of Administrative Procedure; courts of special jurisdiction for labor law, trade law and taxes; Legal Services in the Defense Department; and a Federal Administrative Practice Act. Mr. Horsky said that legislation to accomplish the Hoover Commission's proposals had been prepared and had either been introduced or would shortly be introduced on the first, second and fourth areas. Work is progressing on legislation dealing with legal services for the Defense Department, he reported. He asked for the help of the members of the House in supporting the legislation.

International Law Planning

Mr. Horsky also reported briefly for the Committee on International Law Planning in the absence of Thomas E. Dewey, of New York, New York, the Committee Chairman. Mr. Horsky, a member of the Committee, said that it has under consideration a preliminary draft of a report on the subject which it expects to present in August.

Scope and Correlation of Work

The report of the Committee on Scope and Correlation of Work, to which the House next turned, contained five proposals dealing with the internal organization of the Association, and two of them aroused considerable opposition.

The first proposal, dealing with the composition of various conference groups to which the Association belongs, was withdrawn by the Committee.

The second proposal was as follows:

> That the Standing Committee on Civil Service be abolished and that the Committee on Scope and Correlation of Work be directed to publish notice of a proposed amendment to the By-Laws to accomplish this purpose.

Joe C. Barrett, of Jonesboro, Arkansas, the Chairman, spoke for the Committee. Mr. Barrett explained that the resolutions he was offering were the result of a study by the Committee of the structure of the Association with an eye toward eliminating committees or other groups that are not now serving the full function for which they were created. The Committee on Civil Service was such a Committee, he said, although there were some who felt that its functions should be greatly expanded while others favored continuing the Committee but curtailing its scope. The latter was the view of the members of the Civil Service Committee itself. The Scope and Correlation Committee felt that the function proposed by the Civil Service Committee was already being performed by a Special Committee, Mr. Barrett said.

Mrs. Fanny Litvin, of Washington, D. C., Chairman of the Civil Service Committee, spoke in opposition to Mr. Barrett's proposal. "We feel that there is a continuing need for this Committee", she declared. "We have, however, felt that the present jurisdiction and tenure is too broad, and we have recommended that the by-laws be amended so as to restrict the operation, the tenure and jurisdiction of this Committee to the states and Federal Government". There was need for work on the state and federal merit systems, she declared, and, although there is a special committee that cuts across the Civil Service Committee's work in one field, when its work is finished, there will still be a need for someone in the Association to see to it that the law is properly implemented and that the practice is adequate. She moved that action on Scope and Correlation's proposal be deferred until August.

Mr. Barrett said that the purpose of the Committee was to obtain the sense of the House on the matter, since it was a Standing Committee and would require an amendment of the By-laws to abolish it. "If the House agrees with the views of Scope and Correlation, it would be a direction, at least inferentially, that Rules and Calendar propose and publish notice of a proposed amendment to be voted on at Los Angeles", he said.

The House then voted, and Mrs. Litvin's motion to defer action was defeated 55 to 53. The resolution of the Committee was then submitted and adopted.

The House then recessed.

Third Session

The House reconvened for its third session at 10:00 A.M. on Tuesday, February 25. Chairman Shepherd presided.

Secretary Calhoun announced the results of the meeting of the State Delegates to make nominations for officers and members of the Board of Governors: President: Ross L. Malone, of Roswell, New Mexico; Chairman of the House of Delegates: Sylvester C. Smith, Jr., of Newark, New Jersey; Secretary: Joseph D. Calhoun, of Media, Pennsylvania; Treasurer: Harold H. Bredell,

of Indianapolis, Indiana; members of the Board of Governors: Third Circuit, Robert K. Bell, Ocean City, New Jersey; Fifth Circuit, E. Dixie Beggs, Pensacola, Florida; Ninth Circuit, Walter E. Craig, Phoenix, Arizona.

Scope and Correlation

The House then returned to the report of the Committee on Scope and Correlation of Work, delivered by Mr. Barrett.

Mr. Barrett offered a recommendation that the Committee on Co-ordination of Bar Activities be abolished and that an appropriate amendment to the Association's By-laws be prepared to achieve this. He said that the work of this Committee overlapped the work of the Section of Bar Activities, the Conference of Bar Presidents, and the Co-ordination Service in the Headquarters of the Association in Chicago, plus the fact that the JOURNAL has a department on Bar Activities and the Public Relations Committee publishes the monthly *Co-Ordinator*. It was the view of Scope and Correlation, Mr. Barrett said, that there was no longer any need for the Co-ordination of Bar Activities Committee.

Weldon B. White, of Nashville, Tennessee, Chairman of the Co-ordination of Bar Activities Committee, spoke in opposition to the recommendation. He said that he agreed that there was an overlapping of functions. "I think it likewise true that there is an overlapping of nearly all committees over others . . . " he said. He had consulted the Co-ordination Service at Headquarters, he reported, and they had jointly made a survey to see what state bar associations throughout the country were doing and to learn what committees the state bar associations had. Many of the replies asked for more help and information from the American Bar Association, and Mr. White took the position that his Committee should be continued to promote an exchange of ideas among the lawyers throughout the country. Many things could, of course, be done better by the staff at headquarters, he admitted, but "If we really want to put it on the basis of efficiency, then the work of a great number of our committees . . . could be better handled in Chicago.

Glenn R. Winters, of Chicago, Illinois, spoke against abolishing the Committee. He argued that regardless of how good a headquarters staff was, "there is need for the organization, for a committee and the direction that it can give. They [the staff] need to have somebody specifically charged with the co-ordination responsibility to look over their work from time to time . . ." he said.

Colin MacR. Makepeace, of Providence, Rhode Island, declared that he also was against abolishing the Committee, although he agreed that duplication of effort should be avoided.

Ben R. Miller, of Baton Rouge, Louisiana, who is the Chairman of the Section of Bar Activities, was in favor of the Scope and Correlation recommendation. The Co-ordination Committee is supposed to do exactly what the Bar Activities Section is supposed to do, Mr. Miller declared. ". . . it is a duplication of effort. It is spreading out too thinly your energies and your funds."

Harold J. Gallagher, of New York, New York, was for continuing the Co-ordination Committee. That Committee was created, he recalled, at a time when the Section of Bar Activities was almost inactive, and, although he was glad to hear that the Section was now going through a "revitalizing" period, he thought that the Committee ought to be retained until the Section had demonstrated that it was going to do the work for which it was originally created.

Mr. Barrett, closing the debate, argued that the activities of co-ordination should be concentrated, not scattered.

The House then voted, and the recommendation that the Committee on Co-ordination be abolished was defeated.

Mr. Barrett then offered the following:

> That the Standing Committee on Ways and Means be abolished and that the Committee on Scope and Correlation of Work be directed to publish notice of a proposed amendment to the By-laws to accomplish this purpose.

Mr. Barrett explained that the Ways and Means Committee had been created when the Association was much smaller, to augment the Association's income beyond what it received from regular dues and to consider means of providing an adequate Headquarters Building. It was the view of Scope and Correlation, he said, that these purposes had now been accomplished and that the Committee was no longer needed.

Philip C. Ebeling, of Dayton, Ohio, the Chairman of the Ways and Means Committee, said that it could not function unless the Board of Governors gave it something to do and that over the past five years, "the job of this Committee has been more or less taken over by about everybody in the Association—the American Bar Foundation, the Endowment, the Board of Governors—everybody has been in on the act", he said. The Committee felt that there was one way in which it could be of service —"the present Headquarters is gradually outgrowing itself", Mr. Ebeling reported. "There is a need right now, if we had more space with the proper tenant organizations that are now ready to come in. . . ." He added that there were no "hard feelings" one way or another if the House saw fit to abolish the Committee.

President Rhyne urged the House to "take another look" at the proposal. "We have already outgrown the magnificent headquarters building" he declared. "We have got to do something to get more space outside to house our facilities that are growing so fast now."

Mr. Barrett suggested that if a Ways and Means Committee were needed at some future time, a Special Committee could always be appointed without making it a permanent part of the organization.

The House then voted and the recommendation was carried.

Mr. Barrett's last proposal, which was adopted without debate, was this:

> That the Special Committee on the Traffic Court Program be made a standing committee and that the Committee on Scope and Correlation of Work be directed to publish notice of a proposed amendment to the By-laws to accomplish this purpose.

Legal Profession of Friendly Nations

Robert G. Storey, of Dallas, Texas, Chairman of the Committee on Co-operation with the Legal Profession of Friendly Nations, made an oral report for that Committee. He explained that this Committee had been set up, with the understanding that there would be little or no expense to the Association, to secure law books and generally give information about American law to interested lawyers in friendly foreign countries. The Committee has asked law publishers for American law books and the results have been excellent, Mr. Storey said. He reported that the biggest law book publisher in the country has promised that it will not make any overseas gifts of libraries except through the American Bar Association. The JOURNAL and other publications are going abroad on an exchange basis, he said, and there has been an increasing number of requests that American jurists and lawyers be sent overseas to give first-hand information about our legal system. He asked for the assistance of all members in the work of his Committee.

Rules and Calendar, Scope and Correlation

The Committees on Rules and Calendar and Scope and Correlation of Work submitted a joint report on their work on several changes in the Constitution and By-laws of the Association. Although they requested no action by the House at this session, Mr. Smith, of New Jersey, gave a brief oral summary of what the Committees have in mind. One of the most interesting proposals, which he said will be offered at the Los Angeles meeting, is to create the office of President-Elect of the Association. Mr. Smith pointed out that as the Constitution now stands, the new President has a very short time to line up his Committees and work out his program for the year. Creating the office of President-Elect will be of great help to a new President, Mr. Smith predicted.

Section of Administrative Law

The House then considered the remainder of the report of the Section of Administrative Law. The Section had two resolutions that had been held over from the second session.

Mr. Beelar, the Section chairman, offered the following resolution:

> RESOLVED, That the American Bar Association notes with satisfaction comprehensive studies of the organization, procedures and practices of agencies of government in the conduct of rule making, adjudication, and related functions, undertaken in the Congress of the United States, together with publication of the responses of the agencies as a basis for further inquiry;
>
> RESOLVED, That the American Bar Association believes that congressional committees and agencies of government should continue and complete the comprehensive study of agency organizational and procedural requirements needed to reaffirm and safeguard the rights of citizens and assure public confidence in adjudicated proceedings free from improper influences;
>
> RESOLVED, That congressional action should simultaneously be taken on proposals with respect to administrative agency practice, procedure and judicial review adopted by the American Bar Association on February 20, 1956. To do so would do much to promote public confidence in the integrity of the exercise of administrative agency legislative and judicial functions.

Mr. Beelar explained that the first paragraph of the resolution referred to a study by a committee of the House of Representatives started about eighteen months ago, which turned out to be an extensive inquiry in matters of procedure in all the bureaus and agencies of the Government. The result of the study was a 2,000-page publication which Mr. Beelar called "the most significant document in terms of actual fact-finding on this subject that has ever been produced". He said that the Section was afraid that unless some interest is shown in the study it will not be continued. The third paragraph of the resolution had been included, he said, to update the Association's interest in legislation already approved. " . . . we did not want to say that we should mark time on our legislative proposals which are already two years old" he said.

Allan H. W. Higgins, of Boston, Massachusetts, Chairman of the House Committee to pass on the report of the Section, suggested the addition of the word *adjudicated* in the second paragraph of the resolution. Mr. Higgins said that he understood that this was apparently the intention of the Section, and his Committee felt that if the resolution were not restricted to adjudicated proceedings, it might seem to be an indirect slap at Congressmen who have urged the State Department to expedite a passport, or something of the sort.

Mr. Beelar accepted the amendment.

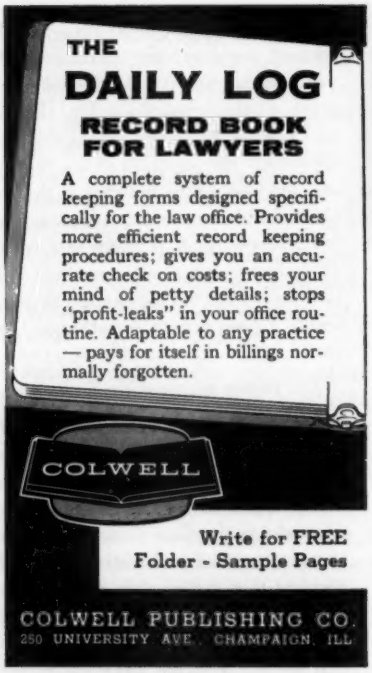
Mr. Higgins also asked if the third paragraph of the resolution, incorporating a reference to legislation formerly approved by the House, included making the Tax Court a part of the proposed administrative court. He recalled that this was the original recommendation of the Administrative Law Section, but that in the end they had agreed with the Taxation Section that the Tax Court should be a separate court.

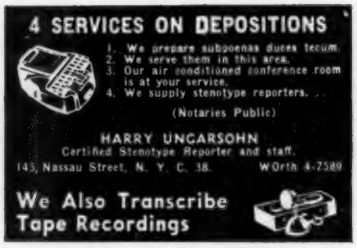
Mr. Beelar replied that the resolution was intended neither to alter nor affirm the previous action of the House insofar as the Tax Court was concerned. "We just didn't get to the subject", he explained.

The House then voted to adopt the resolution.

Mr. Beelar then proposed the following:

> WHEREAS, the American Bar Association has repeatedly urged that the organization and procedure of federal administrative agencies in the exercise of adjudicatory powers provide (1) that hearing officers be assured independence of judgment and impartiality in the trial of agency cases, (2) that the integrity of the judicial process at all levels in the agency be protected by confining decisions to the public hearing-record in an environment totally free from any ex parte off-the-record representations, influences or pressures from any source,
>
> NOW, THEREFORE, This Association records its opinion that more effective agency and congressional action to those ends would improve and inspire greater public confidence in agency adjudicatory determinations, and believes it desirable that an appropriate code of agency-tribunal *standards of conduct* comparable to the Canons of Ju-





dicial Ethics be established by statute binding upon all persons engaged, interested, participating in, or seeking to affect the result of the adjudication of agency-tribunal cases.

He explained that there are ten major departments of the Government in which there are sixty-six tribunals hearing and deciding cases as well as twenty-two independent agencies with thirty-six tribunals. "We have no machinery to get them together to agree upon standards of conduct and the only way to think this ever can be done is to ask the Congress to sponsor by statute a requirement that we have standards of conduct for the agency people who are going to act like judges and decide these cases", he said.

The House voted to adopt the resolution. (The words *standards of conduct*, italicized above, were substituted on the floor of the House for the word *ethics*, the Section's original wording. The change was suggested by Mr. Higgins' Committee and accepted by the Section.)

International Law Unification

The next report was that of the Committee on International Unification of Private Law, delivered by Joe C. Barrett, of Jonesboro, Arkansas, the Chairman. Mr. Barrett made an oral report to the House requiring no action. He said that the Committee was working on a four-phase report—the first phase giving a brief history of what organizations throughout the world are doing to achieve uniformity of the law; the second, a report on what is now being done to promote international uniformity in private law; the third, a report on the impact of those international activities upon the United States; and the fourth, the Committee's recommendation to the House. He said that excellent progress has been made on the report, but the subject is so formidable that it will probably be impossible to make the final report by August.

Section of Patent Law

The Section of Patent, Trademark and Copyright Law, speaking through its Chairman, Frank E. Foote, of Pittsburgh, Pennsylvania, had two matters that required action by the House. The first, approval of an amendment of the Section's by-laws to provide for a Chairman-Elect, was carried without debate.

The second proposal of the Patent Law Section was this:

> RESOLVED, That the American Bar Association approve S. 1864, and that the Section of Patent, Trademark and Copyright Law be authorized to communicate to interested parties the action of the Association in approving this bill.

Mr. Foote explained that S. 1864 would increase the number of examiners-in-chief in the Patent Office from nine to not more than fifteen, increase the salary of the Commissioner of Patents and give the Commissioner power to appoint his staff and fix the salaries of the staff.

The resolution was carried without debate.

Committee To Co-operate with Medical Association

Frank C. Haymond, of Charleston, West Virginia, gave a brief oral report for the Committee To Co-operate with the American Medical Association.

Committee on Grievances

Cuthbert S. Baldwin, of New Orleans, Louisiana, Chairman of the Committee on Grievances, said that the report of his Committee was on the desks of the delegates and had been filed.

Section of Corporation Law

The report of the Section of Corporation, Banking and Business Law was delivered by the Section Delegate, Churchill Rodgers, of New York, New York. Mr. Rodgers proposed three resolutions, the first two of which were non-controversial. They were as follows:

> I. *Creation of a Special Committee To Study and Make a Report to the 1958 Annual Meeting of the House of Delegates on the Subject of Federal Liens.*
>
> WHEREAS, The Section of Corporation, Banking and Business Law; the Section of Real Property, Probate and Trust Law; the Section of Taxation and the Section of Insurance, Negligence and Compensation Law of the American Bar Association, are all deeply concerned with the necessity of amending Sections 6321 and 6323 of the Internal Revenue Code, Sections 2410 and 2463 of the Judicial Code and R. S. Section 3466 (31 U.S.C.A. Section 191) so as to more clearly and equitably provide for the status of federal liens when arrayed with all other liens and claims against property

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and to provide for a simple, speedy and equitable determination of said liens and claims; and

WHEREAS, Each of said Sections has one or more committees studying this matter and it is clearly desirable that said Sections, if possible, come forward with uniform recommendations and proposed amendments to the aforesaid statutes; and

WHEREAS, It is deemed desirable to produce as speedily as possible a report regarding the present status of federal liens and recommendations for amendment of the aforesaid statutes and such other related statutes as appear desirable;

NOW, THEREFORE, BE IT RESOLVED, That the House of Delegates hereby creates a special committee of the Association designated "The Committee on Federal Liens" to be composed of nine members consisting of a chairman and two committee members to be appointed from the members of each of said four Sections, such committee to study and draft a report to be submitted to the House of Delegates at its annual meeting in 1958 in Los Angeles, California, on the subject of federal liens and a proposed draft of amendment to the aforesaid statutes and such other related statutes as appear desirable in order to provide greater equity as between federal tax liens and other lienors and claimants, and to clarify the entire matter.

II. *Approval of an Amendment to Section 8(a) of the Securities Act of 1933 for the Purpose of Denying to the Commission the Power To Refuse, for Reasons Unrelated to Disclosure, To Accelerate the Effective Date of a Registration Statement on the Filing of a Pricing Amendment.*

RESOLVED, That the American Bar Association approves the amendment to Section 8(a) of the Securities Act of 1933, Title 15, U.S.C.A., Section 77h(a), submitted by individual members of the Committee on Federal Regulation of Securities of the Section of Corporation, Banking and Business Law of the Association to the Special Sub-committee on Legislative Oversight of the Committee on Interstate and Foreign Commerce of the House of Representatives, for the purpose of denying to the Securities and Exchange Commission the power to refuse, for reasons unrelated to disclosure, to accelerate the effective date of a registration statement on the filing of an amendment thereto which makes changes therein only with respect to the offering price of a security and matters related thereto, by adding at the end thereof the following:

"and except that if an amendment filed prior to the effective date of such statement makes changes in such statement only in information with respect to offering price, concessions and commissions, amount of proceeds to the issuer (or to any person directly or indirectly controlling or controlled by the issuer, or under direct or indirect common control with the issuer), interest and dividend rates, conversion rates, call prices, underwriters, and such other matters dependent on offering price as the Commission may by rules or regulations or by order designate as necessary or appropriate in the public interest or for the protection of investors, the registration statement shall be deemed to have been filed on the nineteenth day prior to the filing of such amendment or on such later date, if any, as the issuer requests in such amendment, or on the day the registration statement or the last previous amendment thereto, if any, was filed, whichever is latest".

FURTHER RESOLVED, That the Committee on Federal Regulation of Securities be authorized to support such amendment before the appropriate committees of Congress.

These resolutions were put to a vote and carried.

The Section's third resolution was a substitute for a resolution of the Labor Relations Law Section which had been referred to the Corporation Section and the Insurance Section at the 1957 Annual Meeting. The Labor Section's original resolution had concerned itself with compulsory filing requirements on *all* pension plans and health and welfare funds. The two Sections had studied the original language of the Section of Labor Relations Law and proposed the following in substitution therefor:

RESOLVED: 1. That Congress enact legislation providing for the compulsory annual filing with an appropriate agency of the Federal Government of complete financial statements of all unilateral and bilateral employee pension and health and welfare funds where the payments into the fund are determined by a formula which is primarily related to factors other than the benefits to be provided, as where amounts paid into the fund are specified to bear a direct relation to the amount of employees' compensation, the number of hours worked or the units of production, except for funds which form part of pension or profit-sharing plans meeting the requirements of Section 401 of the Internal Revenue Code and which are exempt from taxation under Section 501 of such Code.

2. That such legislation provide that any officer or employee of any party establishing such funds, be prohibited from profiting in any manner, whether directly or indirectly, through the creation, administration, or investment of such funds, with appropriate penalties for violation thereof.

3. That such legislation prohibit the payment by or on behalf of any insurer of commissions or emoluments to any officer or employee of any party to such fund, and the receipt by any such officer or employee of any such commissions or emoluments. That such legislation also provide for the prohibition of any conflict of interest transaction by any trustee or administrator of such fund, or by any officer or employee of a party to such fund.

BE IT FURTHER RESOLVED:

That the foregoing Resolution be presented to the House of Delegates of the American Bar Association for immediate adoption.

George E. Beechwood, of Philadelphia, Pennsylvania, the Section Delegate of the Insurance Law Section, urged the House to adopt the substitute resolution.

Theodore R. Iserman, of New York, New York, the Labor Law Section's Delegate, said that while he personally favored the resolution, the members of the Section's Council representing unions were opposed to it. They objected, he said, to exempting the pension and health and welfare funds described in the first paragraph of the resolution on the ground that the Labor Section's original resolution had been aimed at an existing evil wherever it is found, regardless of whether the victim of fund mismanagement was an employee-beneficiary or the stockholder of a company. These members of the Council

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also could not understand the elimination of the requirement of an affidavit, he explained, and they felt that it was wrong to eliminate a prohibition against paying commissions for services not rendered, a provision that had been included in the Labor Law Section's original resolution.

Philip C. Ebeling, of Dayton, Ohio, asked that the third paragraph be severed from the rest of the resolution. "I don't see how we can stand before the bar of public opinion and say that we approve of paying commissions for services not rendered", he declared.

John Barker, Jr., of Boston, Massachusetts, delegate of The Association of Life Insurance Counsel, speaking on the first two objections pointed out by Mr. Iserman, said that Congress should not adopt unnecessary requirements affecting all pension and welfare plans. This would only "increase operational costs and thereby reduce benefit and interfere with the healthy growth of these funds", he said. The same objection applied to the affidavit provision of the Labor Section's original resolution: it would mean a vast amount of paper work that would increase the costs of benefit plans as to which no problem of corruption exists, since most benefit plans, unlike the union benefit funds, are closely controlled by state law. "I think it would be a great mistake to superimpose over the state system of regulation that is now in effect a more elaborate system of federal regulation", he said. "This would be harmful to everybody involved."

The House then voted to adopt paragraphs one and two of the resolution.

Mr. Beechwood answering Mr. Ebeling's objections to the third paragraph, pointed to its language and declared that it was hardly "scotfree" legislation. " . . . it goes right to the point of giving the proper authority to protect when necessary . . . and also [does] away with the unnecessary commissions . . . " included in the Labor Section's version, he said.

Mr. Rodgers declared that this was a field that Congress had left to the states and that it was the opinion of his Section that this was the proper thing to do.

The House then voted to adopt the third paragraph of the resolution.

Individual Rights—National Security

Ross L. Malone, of Roswell, New Mexico, Chairman of the Committee on Individual Rights as Affected by National Security, then reported for that Committee on a matter that touched off one of the liveliest debates of the Atlanta meeting. Mr. Malone's report dealt with S. 2646, a bill introduced in Congress by Senator Jenner, of Indiana. Mr. Malone summarized the bill as withdrawing "from the appellate jurisdiction of the Supreme Court five types of cases. They may be summarized as involving congressional committees, executive security programs, state security programs, school boards, and admissions to the Bar". Mr. Malone said that his Committee was taking no position as to any Supreme Court decisions, "As we view it, the question with which this House is concerned is the modification of the appellate jurisdiction of the Supreme Court by act of Congress" he declared. "It's the feeling of the Committee that it is an integral part of our judicial system that there be uniformity in appellate reviews, and that the enactment of this legislation would destroy entirely the uniformity which might otherwise exist. . . ."

Mr. Malone's report required no action by the House, since the Board of Governors had already prepared a resolution on the subject to submit to the House. Secretary Calhoun, for the Board, explained that the Board of Governors had drawn up its resolution after receiving a letter from Senator Wiley, of Wisconsin, calling attention to S. 2646, and urging the Association to express its views with respect thereto. Mr. Calhoun then moved adoption of the following.

> BE IT RESOLVED, By the American Bar Association that it opposes the passage of S. 2646.

John C. Satterfield, of Jackson, Mississippi, then proposed that the Board's resolution, as moved by Mr. Calhoun, be amended by adding three *whereas* clauses.

The debate that ensued centered around Mr. Satterfield's third whereas clause, which read as follows:

> WHEREAS, although since 1949, there have been rendered by the Supreme Court decisions within the fields specified by S. 2646 which are felt by many to be contrary to the recognized constitutional precedents and which undertake to confer upon the Federal Government powers reserved to the states by the Constitution of the United States and to confer upon the Supreme Court authority not vested in it by that document, nevertheless the welfare of the people of the United States will be better served by preserving the checks and balances of our constitutional form of government than by in effect removing from the legislative branch restraints of constitutional limitations within vital fields of human conduct. . . .

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The debate was entirely on Mr. Satterfield's amendment, all speakers indicating that they were opposed to S. 2646. Mr. Satterfield, who opened the debate, said that the bare wording of the Board of Governors' resolution would be subject to misconstruction. "It could be and would be construed as being in approbation of those things that were [mentioned] in Senate Bill S. 2646", he declared.

Loyd Wright, of Los Angeles, California, urged adoption of Mr. Satterfield's amendment. He pointed to the Malone Committee's report on S. 2646, whose first paragraph specifies the five types of cases in S. 2646, and which goes on to say: "'Since *maintenance of individual rights* is the most notable distinction between our system and the Communist system'. This is a very delicate field we are dealing with", Mr. Wright observed. "There are presently before the Congrsss many bills covering this necessary and delicate legislation. Certain bleeding hearts are apparently looking under the bed for an invasion of civil rights, unmindful entirely of the rights of 173,000,000 loyal Americans. . . ."

Franklin Riter, of Salt Lake City, Utah, was also in favor of the amendment. "I do not want certain New York newspapers, a certain newspaper in Washington and one in Denver and one in San Francisco to say that even in my humble capacity [as a member of the House] I was a party to an act of approbation of certain recent decisions of the Supreme Court of the United States."

Whitney North Seymour, of New York, New York, was of a different opinion. "I think it would be a tragic mistake to adopt this substitute", he declared. "Each of us has a right as an individual to have any views he wants to about any decision of the Supreme Court. I think to adopt a general resolution which includes in a vague general way an attack upon undefined decisions of the Supreme Court would be a tragic departure from the tradition of the House and the Association to uphold the independence of the judiciary and the integrity of judicial review".

David F. Maxwell, of Philadelphia, Pennsylvania, supported Mr. Seymour's position. "This is the first time this Association has had an opportunity to go on record in defense of the Supreme Court as an institution since the rash of decisions which created so much confusion in the minds of the public because of the widespread criticism against them", he declared.

William B. Spann, Jr., of Atlanta, Georgia, declared that he did not want to vote in favor of "any resolution which may be considered an endorsement collectively by this group of some of the decisions of the Supreme Court. Therefore I do not wish to vote for the resolution without the amendment."

Judge E. B. Smith, of Boise, Idaho, said that he was heartily in favor of Mr. Satterfield's amendment. He declared that the main question before the House was the appellate jurisdiction of the Court, adding that S. 2646 was a "reflection of government by men and their passions rather than of a government by law". At the same time he said, he could not agree with the lines of cases mentioned in S. 2646.

The debate was interrupted at this point when the House recessed for the noon hour until 1:50 P.M.

Fourth Session

When the House reconvened at 2:00 P.M., Mr. Satterfield offered the following substitute for his original motion:

WHEREAS, In 1949 the American Bar Association adopted a resolution urging the Congress to submit to the electorate an amendment to the Constitution of the United States, to provide that the Supreme Court of the United States shall have appellate jurisdiction in all matters arising under the Constitution; and

WHEREAS, S. 2646 now pending before the Congress, if enacted, would forbid the Supreme Court from assuming appellate jurisdiction in certain matters, contrary to the action heretofore taken by this Association and contrary to the maintenance of the balance of powers set up in the Constitution between the executive, legislative and judicial branches of our government;

NOW, THEREFORE, BE IT RESOLVED, That reserving our right to criticize decisions of any court in any case and without approving or disapproving any decisions of the Supreme Court of the United States, the American Bar Association opposes the enactment of Senate Bill 2646, which would limit the appellate jurisdiction of the Supreme Court of the United States.

Mr. Satterfield said the purpose of all the members of the House was to take a position on S. 2646 that could not be misunderstood. He believed that this new language would accomplish that purpose, he said.

President Rhyne urged adoption of the resolution in this form. By adopting it, he said, we shall show that "the Bar has indeed lived up to its duty and has indeed defended the institution of the courts, including the Supreme Court of the United States, and I think that by this resolution we will tell the whole nation that we back that idea."

Gerald P. Hayes, of Milwaukee, Wisconsin, declared that he had as much respect as anyone for the Supreme Court and at the same time disliked some of its recent decisions as much as anyone, but he felt, he said, that the short sentence originally proposed by the Board of Governors should be adopted. "It seems to me that it is entirely superfluous for us to say that we reserve the right to criticize the Supreme Court", he said. "We have before us a simple proposition of whether or not we want to regard the Supreme Court as the final arbiter in this country of our judicial affairs, and we ought to stand by the Court and say so, and not do it with any reservations".

Alfred J. Schweppe, of Seattle, Washington, declared that the resolution was far more effective in Mr. Satterfield's form than in the Board's form. "It will be far more impressive . . . to say that here is an organization which, although many of its members disagree with certain rulings of that Court, nevertheless supports that institution against congressional raids on its appellate jurisdiction in order to maintain the constitutional balance of power", Mr. Schweppe said.

Mr. Malone added that he thought that the record ought to be made entirely clear that his Committee's report on S. 2646 implied neither approval nor disapproval of any Supreme Court decision.

The House then voted, and the substitute resolution proposed by Mr. Satterfield was adopted.

Committee on Commerce

Benjamin Wham, of Chicago, Illinois, Chairman of the Committee on Commerce, offered the following resolution, which was adopted without debate:

WHEREAS, The President of the United States, in an address at the June 24, 1957, Governors' Conference, warned against excessive concentration of power in government, pointed to the need of maintaining our constitutional separation of powers in which states retain all power other than that which was given to the federal government, pointed to the trend away from the states to the federal government, and recommended that the Governors' Conference join with the Federal Administration in setting up a joint committee to designate the functions which the states should assume but which are now performed or financed in whole or in part by the federal government and to recommend revenue adjustments to enable the states to assume such functions;

WHEREAS, Pursuant to the President's suggestion to the Governors' Conference a Joint Federal-State Action Committee was appointed by the President and by the Conference of Governors;

WHEREAS, Said joint Committee has now submitted its initial report including the following recommendations:

(1) That full responsibility for older programs which include vocational agriculture, home economics, trades and industry and distributive occupations which are traditionally a private, local and state matter and which are largely financed now by state and local governments, be assumed by states, and that they develop necessary means for providing the additional funds to replace the federal grants;

(2) That the same action be taken with regard to the practical nurse training program and the fishery trades and industry vocational program; and for municipal waste treatment plants;

(3) That with regard to national disaster relief for damages to public facilities, that the state and local governments become primarily responsible with the exception that federal financial assistance be provided only for major disasters; that state civil defense agencies be given the responsibility for disaster relief functions as provided in the Model Civil Defense Act; and that each state set up a disaster emergency or contingency fund for these purposes;

(4) That a greater share of responsibility for the promotion and regulation of the peacetime uses of atomic energy particularly in the fields of health and safety should be vested in the state governments, and that the states undertake greatly increased responsibilities but cooperate fully with the federal government in this field; and

(5) That the states assume increased responsibility for slum clearance and urban renewal programs including the establishment of a State Housing and Urban Renewal Agency and the assumption of financial responsibility for making the planning advances in connection with Title I of the Housing Act, and to cooperate fully with the federal government in this field;

WHEREAS, the above and other assumptions of responsibility by state governments will require additional taxes and the Joint Committee also recommended that the federal tax on local telephone service be changed to provide up to a 40% federal tax credit against the federal local telephone service tax in states enacting or increasing such taxes, the credit arrangement to last for five years, at which time the federal tax will automatically be reduced by 4 percentage points;

WHEREAS, the Joint Committee is considering making other taxes available to the states such as estate, cigarette and excise taxes;

WHEREAS, the Joint Committee is also considering other functions and proper governmental responsibility including, among others, low rent housing, old age assistance, water use and conservation and greater responsibility by states and localities for public school construction costs; and

WHEREAS, it is deemed desirable that steps such as those outlined above be taken at once in order to check present trends toward centralization of power in the federal government;

NOW THEREFORE, IT IS RESOLVED that the American Bar Association approves in principle the above policy and program proposed by the Joint Federal-State Action Committee.

Junior Bar Conference

The Junior Bar Conference, reporting through its Delegate, William C. Farrer, of Los Angeles, California, offered the following, which was approved without debate:

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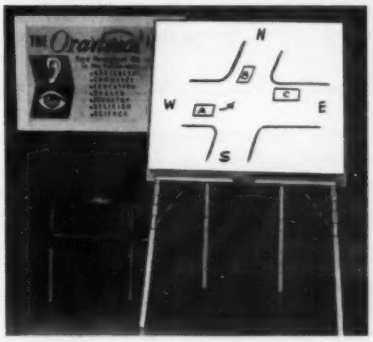

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That the House of Delegates approve the proposed amendments to the by-laws of the Junior Bar Conference, as attached to the Conference report.

Section of Mineral Law

Floyd L. Rheam, of Tulsa, Oklahoma, gave the report of the Section on Mineral and Natural Resources Law. On his motion, the House voted to approve a change in the Section's by-laws raising the Section's dues from $5 to $7 per year.

Section of Taxation

Lee I. Park, of Washington, D. C., Chairman of the Section of Taxation, gave an oral report for his Section, calling the attention of the members of the House to a booklet prepared by the Section containing all its legislative recommendations pending at the time of preparation. He discussed briefly the status of Association-endorsed taxation bills now before the Congress.

Committee on Traffic Court

Roy A. Bronson, of San Francisco, California, reported for the Committee on Traffic Court Program. The Committee's first recommendation—that it be made a Standing instead of a Special Committee—had already been approved by the House in connection with the report of the Committee on Scope and Correlation of Work (see *supra*, page 381). Mr. Bronson offered the following additional recommendation:

> That the House of Delegates approve the immediate and long range needs for the improvement of traffic courts, adopted by the first national Public Officials Traffic Safety Conference as set forth in the Appendix to this report.

Mr. Bronson explained that the House had in effect approved these long-range plans in past years and that what was wanted was a new "date line" on them. The recommendation was approved without debate.

Committee on Communist Strategy

Peter Campbell Brown, of New York, New York, the Chairman of the Committee on Communist Tactics, Strategy and Objectives, gave an oral report requiring no action by the House. He discussed the Association's brief as *amicus curiae* in the *Sheiner* case in Florida and an Oregon case now pending in which an alleged Communist is seeking admission to the Bar. The Oregon Supreme Court has held that the *Konigsberg* decision does not apply, Mr. Brown said and added that the Committee knew that this was a "delicate area" and did not want to submit a formal report without sufficient consideration so it offered no recommendation at present.

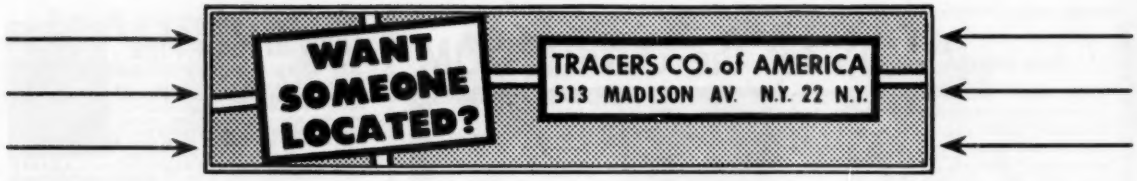
Section of Criminal Law

The Section of Criminal Law reported through its Chairman, Rufus King, of Washington, D. C. Mr. King proposed two resolutions, the first of which was adopted without debate. These resolutions were as follows:

> I. RESOLVED, That the American Bar Association endorses probation service as essential to the functioning of all criminal courts both for sentencing and supervision of offenders. Courts have an inherent right to probation staff sufficient in number and adequate in training to enable them to discharge their public responsibility, and the judiciary should be empowered by statute to effectuate that purpose.
>
> FURTHER RESOLVED, That the American Bar Association urges state and local bar associations to familiarize themselves with the extent of probation services in their communities, and to support adequate probation service for the courts.
>
> II. RESOLVED, That the American Bar Association approves and recommends the passage by Congress of: H. J. Res. 424, to create institutes and joint councils for the study of sentences in the federal courts; H. J. Res. 425, authorizing federal courts to shorten or eliminate the imprisonment required for parole eligibility in appropriate cases; and H. R. 8923, extending the federal Youth Correction Act to include persons under the age of twenty-six years at the time of conviction.
>
> FURTHER RESOLVED, That the Section of Criminal Law be, and it hereby is, authorized on behalf of the American Bar Association to support and advocate the passage by Congress of the aforesaid measures by all appropriate means.

The Board of Governors had not approved endorsement of H.R. 8923 appearing in the first paragraph of the second resolution. Secretary Calhoun explained that the Board felt that twenty-six was getting into adulthood and that increasing the age in the Youth Correction Act from 22 to 26 was going beyond the Act's purposes.

Arthur J. Freund, of St. Louis, Missouri, the Section Delegate for the



Criminal Law Section, said that he thought that the Board had misunderstood the proposal.

Franklin Riter, of Salt Lake City, Utah, who is the Board of Governors' "liaison" with the Criminal Law Section, said that while he could not impeach the Board's action, it was his personal opinion after talking with Mr. King and Mr. Freund that increasing the age limitation was justified. "It is not arbitrary" he said. "It remains entirely with the judge. Many of us have been in federal court on those sad occasions when the criminal calendar has been handled, and we have seen this type of case, where a man was technically over the age of the youth correction statute but it was indicated that the judge should have the power to place him in that jurisdiction rather than sending him to the jailhouse".

The House voted to adopt the resolution.

Committee on Lawyer Referral Service

Harry Gershenson, of St. Louis, Missouri, Chairman of the Committee on Lawyer Referral Service, said that the report of his Committee was on the desks of the delegates.

Committee on Legal Aid Work

William T. Gossett, of Dearborn, Michigan, Chairman of the Committee on Legal Aid Work, gave an oral report requiring no action. He declared that in his opinion nothing was increasing public esteem for the legal profession more than the Legal Aid Program. He noted that labor union leaders some time ago had been thinking about setting up their own legal aid staffs, a step that would raise problems of unauthorized practice of the law. That plan has been changed, Mr. Gossett said, announcing that the AFL-CIO had recently contributed $1,000 to Legal Aid and that they had received a letter from George Meany, the President, saying that organized labor was satisfied with the legal aid situation and that they wanted to support the program.

Committee on Public Relations

Richard P. Tinkham, of Hammond, Indiana, reported that the Committee on Public Relations had no recommendations.

Committee on Regional Meetings

Lewis F. Powell, Jr., of Richmond, Virginia, Chairman of the Regional Meeting Committee, made a brief oral report, calling attention to the Regional Meeting to be held in St. Louis in June and the one to be held in Portland, Maine, in October.

Committee on Administration Agency Appointments

Clarence A. Davis, of Washington, D. C., Chairman of the Committee on Administrative Agency Appointments, spoke briefly. His is a new Committee, which will consider nominations of lawyers as members of independent federal agencies in the same manner that the Committee on the Federal Judiciary screens nominations to the Federal Bench.

Economics of Law Practice

John C. Satterfield, of Jackson, Mississippi, Chairman of the Committee on Economics of Law Practice, reported that his Committee was setting up a speakers bureau to furnish programs to any state or local bar association desiring them, on the business phases of the practice of the law. Mr. Satterfield said that the Committee is also preparing a speakers' kit, which will be available within the month, to be sent free to state bar associations and to others who request it at perhaps a nominal cost. He said that West Publishing Company has agreed to print, at no cost to the Association, between 100,000 and 150,000 copies of each of three pamphlets to which reference was made in his report, for distribution to every member of the Association. Mr. Satterfield also outlined the details of his Committee's "Operation Check-Up" plan.

Committee on Federal Legislation

The Chairman of the Committee on Federal Legislation, Robert W. Upton, of Concord, New Hampshire, explained that his Committee had been set up to assist other Committees and Sections of the Association who are charged with responsibility for presenting the Association's position on federal legislation. Its job is to assist other committees and it will not conflict in any way with them, he emphasized.

Lawyers in the Armed Forces

Osmer C. Fitts, of Brattleboro, Vermont, Chairman of the Committee on Lawyers in the Armed Forces, reported that progress was being made on S. 1165, which would provide extra compensation for lawyers serving in the Armed Forces. The purpose is, he said, to keep career lawyer-servicemen in the Armed Forces.

Unemployment and Social Security

Earl F. Morris, of Columbus, Ohio, Chairman of the Committee on Unemployment and Social Security, outlined a five-point program which his Committee is undertaking. The program deals with studies of the social security laws and may result in proposals for changes in the laws, he said. No action was called for at this time.

William Logan Martin, of Birmingham, Alabama, asked Mr. Morris if it were not a fact that the Social

(Continued on page 393)

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FOR

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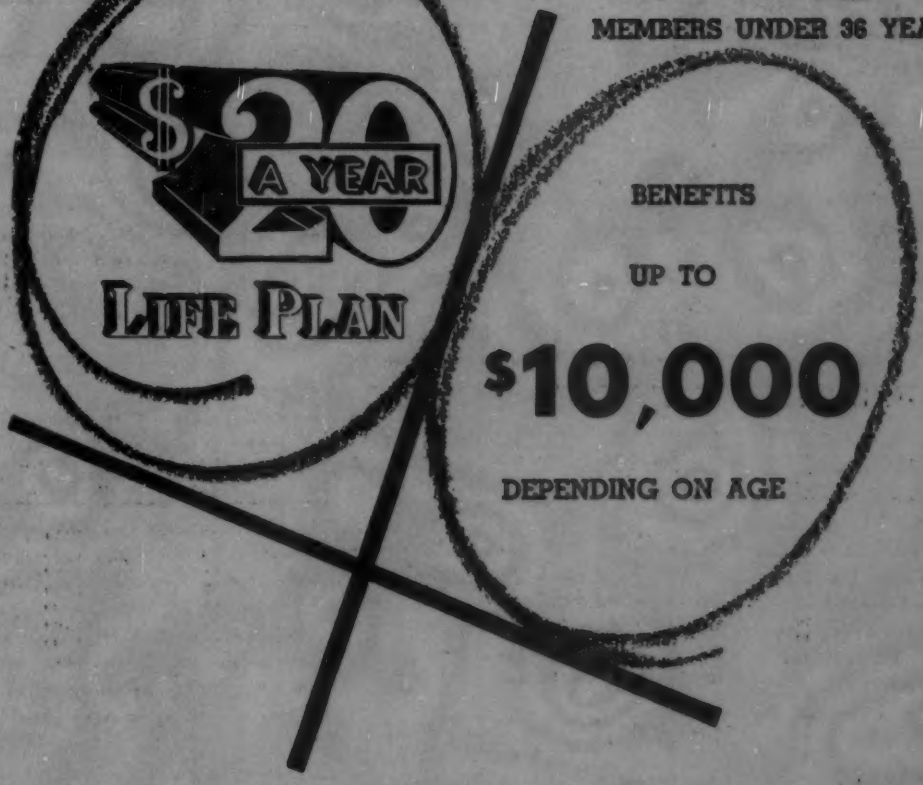

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26	9,500	34	5,500	42	2,600	50	1,500
27	9,000	35	5,000	43	2,400	51	1,400
28	8,500	36	4,600	44	2,200	52	1,300
29	8,000	37	4,200	45	2,000	53	1,200
30	7,500	38	3,800	46	1,900	54	1,100
31	7,000	39	3,400	47	1,800	55	1,000
32	6,500	40	3,000	48	1,700	56	-0-

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Proceedings of the House of Delegates

(Continued from page 390)

Security system is "in the red". Mr. Morris replied that he thought that there was disagreement about that, but said that his Committee would be glad to make a study of the point if it was requested to do so.

Board of Governors

The House then voted to approve the report of the Board of Governors except in cases where the House had already taken different action.

Committee on Unauthorized Practice

Thomas J. Boodell, of Chicago, Illinois, Chairman of the Committee on Unauthorized Practice of the Law, reported on three recent unauthorized practice cases—one in Connecticut, where the Association has intervened with a brief as *amicus curiae* joining the state Bar in attempting to prevent two Hartford banks from "boldly and openly" holding themselves out as qualified to render legal services in connection with the administration of trusts and estates; a second in Illinois, involving the Brotherhood of Railroad Trainmen who funnel personal injury cases involving their members to sixteen sets of so-called regional counsel throughout the country; and a Colorado case, in which the Colorado court finally held that non-lawyers could draft conveyances and other instruments affecting titles to real estate. The problem is one of education, Mr. Boodell said, and his Committee is working to have articles written for various law reviews on unauthorized practice.

Section of Legal Education

Herbert W. Clark, of San Francisco, California, Chairman of the Section of Legal Education and Admissions to the Bar, moved that the House grant full approval to Texas Southern School of Law at Houston and the Judge Advocate School of the Army at Charlottesville, Virginia.

The motion was carried without debate.

Aeronautical Law Committee

R. E. Robertson, of Juneau, Alaska, a member of the Committee on Aeronautical Law, moved adoption of a resolution drawn up by that Committee. The resolution urged the President of the United States "promptly to take such action as he shall find appropriate to prepare and arrange for international consideration of legal problems relating to the use of space".

Mr. Maxwell, of Pennsylvania, said that it was his understanding that the Government has not yet formulated a sound policy on what should be the law of outer space, since it is so new, and therefore it is premature to direct the President immediately to negotiate on an international basis. He pointed out that the Section of International and Comparative Law has a committee on space law, consisting of eminent authorities, and he moved that the resolution be referred to the Section of International Law for report at Los Angeles.

Mr. Maxwell's motion was carried and the resolution was so referred.

Committee on Draft

Philip C. Ebeling, of Dayton, Ohio, Chairman of the Committee on Draft, then proposed a resolution of thanks to the Bar Associations of Atlanta and Georgia, which was unanimously adopted.

The House then adjourned *sine die* at 4:05 P.M.

Ethics and the Unauthorized Practice of the Law

(Continued from page 353)

> business of giving legal advice based on their knowledge of the subjects. A foreign lawyer who is familiar with the law of the country in which he is a lawyer is in a similar position. He is a specialist in a particular field of the law, but is nevertheless a layman in this State when he is not a member of the bar here.

The entire discussion is a noteworthy discussion of unauthorized practice of the law and should be read.

Title companies claim that certain legal services are necessarily rendered by them because of their interest, by way of subrogation, when selling a title insurance policy. A recent Texas case following the principles above outlined has helped to clarify this subject[30] but a Florida case has muddied the waters.[31]

Not long ago some lawyers organized a title company, in conjunction with which they had many employees, some on the payroll of the title company and some on their own, and in most transactions the law firm prepared the required legal papers. This presented a breach of the Canons of Ethics, and was roundly condemned by the court with quite uncomplimentary language about the lawyers involved.[32]

Although ethical principles regarding the relationship between corporate fiduciaries and lawyers are well set out in an existing Statement of Principles between the American Bar Association and The American Bankers Association, Trust Division, nevertheless, recently it became necessary for an Arkansas court to sustain the position of the Bar, and to state among other things, that while a bank may advertise its legitimate services, it must not

30. *Hexter Title & Abstract Co.* v. *Grievance Committee*, 179 S.W. 2d 946.

31. *Cooperman* v. *West Coast Title Co.*, 75 So. 2d 818.

32. *Rattikin Title Co.* v. *Grievance Committee*, 272 S.W. 2d 948.

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indicate that these are such as should be performed by a lawyer.[33]

In Connecticut, a trial court, in an action brought against certain trust companies, found in effect that most of the practices complained of, whether through laymen or lawyer employees, did not conflict with the public interest and did not constitute the illegal practice of law.[34]

This case is under appeal and the American Bar Association through its Committee on Unauthorized Practice of the Law has filed a brief as *amicus* which contains the sentence:

> The very nub of the trial court's opinion was its astounding holding that the defendants, when acting as executor, administrator, trustee, etc., were acting, not for others but for themselves.

The brief points out that a bank is not acting for itself but in its representative capacity, and while an executor or administrator, it is a fiduciary for creditors and is representing the interests of the beneficiaries. The brief urges recognition of the basic fact that the banks in many instances are acting not primarily for themselves but for others, and that in many of their activities they are engaged in the unlawful practice of the law and that it is immaterial whether the employees who do the work complained of are lawyers or laymen because it is the bank that is furnishing the services in its representative capacity. It is contended that these activities are violative of the Statement of Principles above referred to. The issues involved are of profound interest and the case should be carefully watched.

Again, when the high court of New Jersey was considering a case involving unauthorized practice of law and violation of the Canons of Ethics, it held that the lawyer had clearly violated Canon 27 relating to advertising and solicitation, and reiterating that the practice of law is a profession, said with reference to the Canons that:

> They do not interfere with the customary methods of practicing law. They are aimed only at the sharp practice of a relatively few members of the Bar who are seeking to invade the plain intent of the Canons to their own personal financial advantage. The first sign of any such intent is likely to be extravagant, extensive advertising, a field in which they have no competitors. The second sign is apt to be the intermingling of the practice of law with the operation of some business that directly and necessarily produces legal work in large volume.[35]

Let me now remind you that unauthorized practice of law in one form or another is not at all new, although every once in a while, some young lawyer discovers it affecting his practice.

Before the American Revolution, John Adams, who afterwards became our country's second President, in 1756 wrote in his diary:

> Looking about me, in the country, I found the practice of law was grasped into the hands of deputy sheriffs, pettifoggers, and even constables, who filed all the writs upon bonds, promissory notes, and accounts, received the fees established for lawyers and stirred up many unnecessary suits. I mentioned these things to some of the gentlemen in Boston, who disapproved and even resented them highly. I asked them whether some measures might not be agreed upon at the bar and sanctioned by the court, which might remedy this evil. They thought it not only practicable, but highly expedient, and proposed meetings of the bar to deliberate upon it. A meeting was called, and great number of regulations proposed, not only for confining the practice of law to those who were educated to it, and sworn to fidelity in it, but to introduce more regularity, urbanity, candor and politeness, as well as honor, equity and humanity, among the regular professors.[36]

Although not directly concerned with either ethics or unauthorized practice of law, an interesting old case is that of *Child* v. *Hearn*, decided in England in 1874, which had to do with the fact that pigs had broken through the fence between the two properties and had done damage to one man's property. Baron Bramwell, who wrote the opinion, said that the question was really how strong a fence the defendant should have built in the first place, and went on to say:

> Nor do we lay down that there must be a fence so close and strong that no pig could push through it or so high that no horse or bullock could leap it. One could scarcely tell the limits of such a requirement for the strength of swine is such that they could break through almost any fence if there were a sufficient inducement on the other side, but the owner is bound to put up such a fence that a pig not under any excessive temptation will not get through it.[37]

It may be added that the fences consisting of codes of ethics, statutes and decided case law, have been pretty strongly built and are fairly high. It may be that there will be some at times, who will try to go through them, but it is up to the Bar to remain eternally vigilant, keep the fences in repair, and *protect the public*. Clearly the enforcement of professional ethics and the prevention of unauthorized practice of law go hand in hand. Both are requisite. One without the other is ineffective.

33. *Arkansas Bar Assn.* v. *Union National Bank* (1954).
34. *State Bar Association of Connecticut* v. *The Connecticut Bank and Trust Company and Hartford National Bank and Trust Company*, Superior Court, Hartford County decided April 15, 1957.
35. *In re Rothman*, 97 A. 2d 621.
36. John Adams, Diary, January 3, 1759. 2 WORKS OF JOHN ADAMS, 58 (Catherine Drinker Bowen, JOHN ADAMS AND THE AMERICAN REVOLUTION).
37. L. R. 9 Ex. 176.

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